# 82-1540

No. 82-



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*,
*Petitioners,*

v.

ROBERTO QASIM, *et al.*,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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## QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution of the United States bars suit:

   (a) brought against an agency which has been specifically delineated in the controlling interstate compact as "an instrumentality and agency" of the signatory States, performing "an essential governmental function";

   (b) brought in a court created by Congress under Article I rather than Article III; and, which is

   (c) brought by a resident of the District of Columbia rather than a resident of a State.

2. Whether an interstate compact that allows suits only in federal District Courts and the courts of the signatory States can nevertheless be interpreted to allow suits in a local court of the District of Columbia.

3. Whether the court below erred in holding, contrary to the express terms of an interstate compact approved by Congress, that the subsequently-enacted District of Columbia Court Reform and Criminal Procedure Act of 1970 gives the courts of the District of Columbia subject matter jurisdiction over private tort damage suits against an interstate agency, even though neither the text nor legislative history of the Act mentions the Compact or suggests that Congress was aware of the Act's potentially revisionary effect.

## LIST OF PARTIES

The Plaintiff-Appellant in case No. 81-1344 before the District of Columbia Court of Appeals was Roberto Qasim, in case No. 81-1616 was Sallie C. Baker, in case No. 81-1613 was Annie Carter, in case No. 82-345 was Frances Green, in case No. 81-1476 was Oleon Jones, and in case No. 82-301 was Willie James Artis. In case No. 82-56, Sandra C. Butterfield and Larry V. Butterfield were Plaintiffs-Appellants.*

The Washington Metropolitan Area Transit Authority was Defendant-Appellee in all cases, and its employee Anthony R. Stewart was a Defendant-Appellee in case No. 81-1476. Deborah M. Reeder was a Defendant-Appellee in case No. 81-1344.**

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*Case No. 82-56 was omitted from the January 26, 1983, *en banc* decision and judgment of the Court of Appeals (App. 2a), but the *en banc* Court of Appeals on March 8, 1983, *sua sponte* amended the caption to its January 26 decision to include case No. 82-56. App. 19a.

**Two cases, Nos. 81-1422 and 82-226, were initially consolidated before the *en banc* Court of Appeals, but were subsequently severed. The Plaintiff-Appellant in case No. 81-1422 was Louise Nixon and in case No. 82-226 was James E. Lagroom. The Washington Metropolitan Transit Authority was Defendant-Appellee in both cases. The District of Columbia and the Authority's employee Curtis R. Hatten were defendants in case No. 82-226, but did not appear before the District of Columbia Court of Appeals.

A fictitious person, "John Doe," was also named as a defendant in case No. 81-1422. In Plaintiff-Appellant's Certificate of Interested Parties, required by Rule 28(a)(1) of the General Rules of the District of Columbia Court of Appeals, Plaintiff-Appellant Nixon listed WMATA employee Roland Truehart as a party, but Mr. Truehart was not named as a party in plaintiff's complaint and the complaint was never amended to add him as a party.

In case No. 81-1344, Sudah Qasim appeared as a plaintiff in the Superior Court, but did not apear before the Court of Appeals. In case No. 81-1616, Napoleon Lewis, Marjorie B. Rice, and Clarence E. Taylor were defendants, but did not apear before the Court of Appeals.

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Petitioners Washington Metropolitan Area Transit Authority and WMATA employee Anthony R. Stewart pray that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals in this matter.

## OPINIONS BELOW

The Memorandum Decisions and the Judgments of the Superior Court judges of the District of Columbia are not reported, but are printed as Appendices C through H (App. 9a-14a) hereto. The decision of the District of Columbia Court of Appeals from which certiorari is sought, dated January 26, 1983, reversing and remanding all the decisions of the Superior Court judges, is not yet officially reported, and appears as Appendix B (App. 2a-8a) hereto.

## JURISDICTION

The Court of Appeals' *en banc* decision and judgment herein was rendered on January 26, 1983. App. 2a. This decision disposed of six of the seven cases contained in this petition (Nos. 81-1344, 81-1616, 81-1613, 82-345, 81-1476, 82-301). On March 8, 1983, the Court of Appeals, *en banc*, entered an order *sua sponte* amending its January 26 decision and judgment to include case No. 82-56, the seventh case from which certiorari is sought. App. 19a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth as Appendix I (App. 15a *et seq.*) hereto.

## STATEMENT OF THE CASE

These are seven cases—all involving The Washington Metropolitan Area Transit Authority ("WMATA" or "the Authority") and the same legal issues—which were consolidated on appeal in the District of Columbia Court of Appeals.

Plaintiffs commenced these actions against, *inter alia*, petitioner WMATA in the Superior Court of the District of Columbia. Each complaint sought money damages based on personal injuries allegedly resulting from the negligence of WMATA or its co-defendant employees. The particular facts pertinent to each plaintiff's individual claim are not relevant to the issues presented in this petition.

In the Superior Court, WMATA denied all allegations of negligence, and moved to dismiss each suit for lack of subject matter jurisdiction. These motions were based in part on the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324

(1966) ("the Compact" or "the WMATA Interstate Compact") and the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) ("1970 Court Reform Act").

***The WMATA Interstate Compact***

The WMATA Interstate Compact was the culmination of efforts by the federal government, Maryland, and Virginia to alleviate the transit problems caused by the Washington Metropolitan Area's steadily worsening traffic congestion. The solution was to develop mass transit facilities composed of an extensive regional bus and subway system.

Congress first manifested concern about the transit problems in the area in the mid-1950's, authorizing funds for a study of the transit problems and how they could be remedied. Pub. L. No. 84-24, 69 Stat. 41 (1955); Pub. L. No. 84-573, 70 Stat. 257 (1956). As the consequence of that study, Congress concluded that a regional mass transit system was both necessary and feasible, but required cooperation among the federal, state, and local governments. The National Capital Transportation Act of 1960, Title I, § 102, Pub. L. No. 86-669, 74 Stat. 537. To achieve these goals, Congress created a National Capital Transportation Agency to develop a regional mass transit system, and also authorized Maryland, Virginia, and the District of Columbia to enter into an interstate compact to carry out the mass transit system, once the system had been developed in the form of "an organization * * * perform[ing] governmental functions of a regional character, including but not limited to the provision of regional transportation facilities." Title III, § 301(a), 74 Stat. 544.

The possibility of such a compact had already been favorably considered, and the parties reached agreement. Congress approved the compact before the year was out. The Washington Metropolitan Area Transit Regulation

Compact Act, Pub. L. No. 86-794, 74 Stat. 1031 (1960). The Regulation Compact Act performed essentially two functions. It established the Washington Metropolitan Area Transit Commission as "an instrumentality of the District of Columbia, the Commonwealth of Virginia, and the State of Maryland * * *" (Title I, Art. II, 74 Stat. 1032), and it empowered the Commission to regulate mass transit in the Washington area, in much the same manner that the Interstate Commerce Commission is empowered to regulate the trucking industry nationwide.

The final step came in 1966 with the adoption by all three jurisdictions and Congress of the WMATA Interstate Compact. Pub. L. No. 89-774, 80 Stat. 1324 (1966); D.C. Code Ann. § 1-2431 (1981); Md. Code Ann. [Transportation] § 10-204 (1977); Va. Code Ann. § 56-529 (1981). The Compact specifically made WMATA a state agency by providing in Section 4 that WMATA was created "as an instrumentality and agency of each of the signatory parties hereto" (App. 16a), and in Section 78 that WMATA was to perform "an essential governmental function." App. 16a-17a. The Compact empowered WMATA to engage in the development, finance, and operation of a regional mass transit system, and it provided in Section 81 that "[t]he United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority * * *." App. 17a-18a.

### *The District of Columbia Court System and the 1970 Court Reform Act*

At the time the Compact was enacted, the District of Columbia judicial system consisted of four local courts, exercising limited criminal and civil jurisdiction, and a normal complement of federal District Courts and a Court of Appeals. The purely local courts were the Court

of General Sessions, the Tax Court, the Juvenile Court, and the District of Columbia Court of Appeals, while the federal courts were the United States District Court and the Court of Appeals for the District of Columbia Circuit.

The primary local court, the Court of General Sessions, had only limited jurisdiction. Its criminal jurisdiction, shared concurrently with the United States District Courts, extended only over misdemeanors and petty offenses. D.C. Code Ann. § 11-963 (1967). On the civil side, its jurisdiction covered cases where the amount in controversy was $10,000 or less, and cases involving title to real property only as part of a divorce action. *Id.* §§ 11-961, 11-1141. The decisions of the District of Columbia Court of Appeals, which heard appeals from the Court of General Sessions, were reviewed, in turn, by the United States Court of Appeals. *Id.* § 11-321.

The United States District Court possessed the same jurisdiction as any other District Court, as well as exclusive jurisdiction over all felony prosecutions (whether based upon federal or local laws) and concurrent jurisdiction over most matters handled by the Court of General Sessions. *Id.* §§ 11-521 to 11-523. The District of Columbia Circuit had its normal federal appellate jurisdiction and, as noted above, also heard appeals from the District of Columbia Court of Appeals. *See generally Palmore* v. *United States*, 411 U.S. 389, 392 n.2 (1973).

In 1970, Congress restructured the local and federal court system in the District. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473. Title I combined the three local trial courts into the new Superior Court and invested this court with jurisdiction equivalent to that exercised by state trial courts in both criminal and civil matters. In particular, the Superior Courts were given civil jurisdiction over all matters in law or equity brought in the District of Columbia, except those within the exclusive

jurisdiction of the United States District Court. D.C. Code Ann. § 11-921 (1981). Review of the decisions of the District of Columbia Court of Appeals by the District of Columbia Circuit was eliminated. *Id.* § 11-301. The newly-created local court system was "established pursuant to article I of the Constitution." *Id.* § 11-101; *Palmore* v. *United States*, 411 U.S. at 398.

***The Lower Court Proceedings***

Each Superior Court judge granted WMATA's motion to dismiss for lack of subject matter jurisdiction, and issued an order to that effect. App. 9a-14a. None of the Superior Court judges issued a written opinion or statement of reasons to accompany his order.

On January 26, 1983, the District of Columbia Court of Appeals, sitting *en banc*, reversed the judgments in six of the cases consolidated on appeal. While acknowledging that "Section 4 of the Compact expressly establishes WMATA as an agency of each sovereign signatory to the Compact" (App. 4a), the court rejected WMATA's contention (and the authorities supporting that contention) that WMATA "is clothed with the sovereign immunity granted by the eleventh amendment to its parent states. *Cf. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)." App. 4a.

First, the court concluded that WMATA's argument was foreclosed by *Nevada* v. *Hall*, 440 U.S. 410 (1979), which the Court of Appeals cited for the proposition that a sovereign could not claim immunity from suit in the courts of another sovereign. "Thus," concluded the Court of Appeals, "Maryland and Virginia do not have sovereign immunity from suits brought in the District of Columbia Courts." App. 4a. Second, the Court of Appeals interpreted Section 80 of the Compact to waive each signatory's immunity from suit in its own courts for " 'any proprietary functions, in accordance with the laws of the applicable signatory' " (App. 4a, quoting Section 80),

which the court found included mass transportation. App. 4a-5a.

In addition, the Court of Appeals held that Section 81 of the Compact did not oust the District of Columbia local courts of jurisdiction over private tort suits, seeking monetary damages, arising out of WMATA's operation of mass transportation. Section 81, according to the Court of Appeals, simply granted jurisdiction to the federal District Courts for Maryland, Virginia, and the District of Columbia over suits brought against WMATA that did not meet the amount-in-controversy requirement for diversity jurisdiction. App. 5a. The court also refused to conclude that the omission of the then-existing Court of General Sessions (the predecessor to the Superior Court) from the Compact excepted the subject matter jurisdiction of the District's local courts. The court attributed that omission to congressional intent to expand the jurisdiction of the United States District Court for the District of Columbia, and further concluded that the 1970 Court Reform Act granted the Superior Courts jurisdiction concurrent with that of the United States District Court for the District of Columbia over all civil actions brought in the District. App. 6a-7a.[1]

On March 8, the *en banc* Court of Appeals entered an order, *sua sponte*, amending its January 26 decision and judgment to add a seventh case (No. 82-56) to its decision and judgment. App. 19a.

## STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

WMATA, in opposing the construction of the WMATA Compact adopted by the Court of Appeals before the Superior Court and the Court of Appeals, raised and argued all of the constitutional and statutory issues pre-

[1] Associate Judge Ferren filed a concurring opinion, interpreting the court's opinion as only assuming that WMATA was entitled to immunity under *Lake Country*. App. 7a-8a.

sented here (see, *e.g.*, Brief of Appellee WMATA in the Court of Appeals, pp. 3-6, 14-18), and all courts either explicitly or implicitly ruled on these issues. App. 9a-14a, 4a-7a. WMATA also raised before the Court of Appeals an objection to the jurisdiction of the Superior Court based on the Eleventh Amendment (see, *e.g.*, Brief of Appellee WMATA in the Court of Appeals, pp. 3, 7-10), and the Court of Appeals specifically ruled on this issue. App. 4a.

## ARGUMENT

### A. Introduction

WMATA respectfully submits that this Court should grant the writ of certiorari because the petition raises an important, and never before addressed, question regarding the applicability of the Eleventh Amendment to suits against an interstate agency brought in Article I courts by residents of the District of Columbia. This petition, furthermore, poses important issues involving the construction of an interstate compact between the States of Virginia and Maryland, as well as the District of Columbia, approved by Congress and, in pertinent part, unamended since its adoption.[2]

The immediate impact of the decision below will be to force WMATA to submit to thousands of similar suits in the local courts of the District of Columbia in derogation of the plain terms of the WMATA Compact and the intent of Congress and the signatory states. Literally hundreds of such lawsuits have been stayed pending the outcome of these cases, and the decision below, if left standing, will pave the way for a limitless number of future suits against WMATA. And all this will come about despite the understanding of the signatories to the WMATA

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[2] Because of Congress' adoption of the WMATA Interstate Compact as a law of the United States, construction of the Compact presents a federal question. *E.g.*, *Cuyler* v. *Adams*, 449 U.S. 433, 438 & n.7 (1981), and cases cited therein.

Interstate Compact, expressed in Section 81, that no suit could be brought against WMATA in the local courts of the District of Columbia. The decision below produces a result at odds with the reasons why the signatories chose to deny the local District of Columbia courts jurisdiction to entertain suits such as these. A reversal of the decision below will ensure that suits are brought before the tribunals identified in Section 81 of the Compact.

The WMATA Interstate Compact, furthermore, is not an isolated example of this type of interstate cooperation. Interstate compacts, described by the States themselves as "[t]he most binding legal instrument to establish formal cooperation among states * * *," have become increasingly commonplace as a means of facilitating intergovernmental cooperation in a myriad of areas since their birth in the early days of the Republic. The Council of State Governments, *Interstate Compacts and Agencies*, p. vii (1979 ed.); The Council of State Government, *The Book of the States 1982-1983*, pp. 15-18 (1982). Over 170 such compacts now exist (*id.* p. 18), with over 50 attendant interstate agencies having been created under these agreements. *Interstate Compacts and Agencies*, pp. 2-32. Each state is a partner to at least 10 compacts (*id.* pp. 35-43), and the District of Columbia belongs to 9 (excluding boundary agreements). *Id.* pp. 43-44. As independent sovereigns, the signatories to these compacts are vitally interested in ensuring that the terms of these agreements are faithfully observed, whether by the other signatories or by the courts. The decision below, which ignored the plain terms of the WMATA Interstate Compact, fails to heed the sovereign interests that these agreements represent.

But the impact of the decision below is also not limited to the WMATA Interstate Compact or to interstate compacts in general. In ruling that Maryland, Virginia, and WMATA can be sued in the District of Columbia, notwithstanding the immunity granted these States and

WMATA by the Eleventh Amendment, the court below addressed an issue never before considered by this Court regarding the applicability of the Eleventh Amendment to suits against an interstate agency brought in the District of Columbia. Only a few Terms ago, this Court held that the Eleventh Amendment, which is unquestionably applicable to Article III courts, is, at the same time, inapplicable to state courts. *Nevada* v. *Hall*, 440 U.S. at 418-421. The question presented here, then, is the logical successor to the one addressed in *Hall* because the District of Columbia courts are neither Article III courts nor state courts, but are federal Article I courts created by Congress under its authority to legislate for the District of Columbia.

To that extent, then, the statutory and constitutional questions presented here are ones that can only be resolved by this Court. The District of Columbia enjoys a unique position in our federal structure, possessing some of the characteristics of both the federal and state governments but without all the attributes of either. Inevitably, therefore, the applicability of federal legislation and constitutional provisions to the District has generated a substantial number of questions which this Court has recognized that only it can finally decide.[3] Chief among these are those questions regarding the distribution of

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[3] *E.g.*, *Key* v. *Doyle*, 434 U.S. 59 (1977) (appealability of decisions from District of Columbia Court of Appeals); *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (applicability of Seventh Amendment to cases brought in Superior Courts involving realty); *District of Columbia* v. *Carter*, 409 U.S. 418 (1973) (applicability of 42 U.S.C. § 1983 to District); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (applicability of *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), to District); *Hurd* v. *Hodge*, 334 U.S. 24 (1948) (applicability of 42 U.S.C. § 1982 to District); *Geofroy* v. *Riggs*, 133 U.S. 258 (1890) (applicability of treaty with France to District); *Callan* v. *Wilson*, 127 U.S. 540 (1888) (applicability of jury trial guarantee of Art. III, § 2, cl. 3, and Sixth Amendment to District); *Hepburn* v. *Ellzey*, 6 U.S. (2 Cranch) 445 (1805) (applicability of diversity jurisdiction of Art. III, § 2, cl. 1, to District).

authority between the courts of the United States and the local courts for the District.[4]

Of even greater importance, however, is the fact that the court below held that the States, their officers, and their agencies, whether acting in an interstate or intrastate capacity, are not entitled to invoke the Eleventh Amendment simply because they were sued in a court created by Congress under its Article I rather than its Article III authority. Accordingly, the descision below implicates the interests not only of the two state signatories to the WMATA Compact—Virginia and Maryland—but also of every other State, because all are potentially subject to the reach of an Article I court. This reach is defined either along geographic lines, as in the District, or in subject matter terms, as were the bankruptcy courts mooted last Term in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858 (1982). Review by this Court is thus necessary to prevent atrophy of the Eleventh Amendment.

Review would therefore be warranted even if the decision below were correct, a conclusion that we will now demonstrate is not supported by this Court's decisions.

### B. The Eleventh Amendment

1. The Court of Appeals correctly recognized the principle that an interstate agency, like WMATA, is entitled to claim the immunity from suit guaranteed wholly intrastate agencies by the Eleventh Amendment. Even though the full Court has never definitively ruled on this issue, three Justices have expressly concluded that an interstate

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[4] *E.g.*, *Feldman* v. *Gardner*, 661 F.2d 1295 (D.C. Cir. 1981), *cert. granted sub nom. District of Columbia Court of Appeals* v. *Feldman*, No. 81-1335 (June 28, 1982) (District Court of Appeals' authority exclusively to regulate District bar); *Swain* v. *Pressley*, 430 U.S. 372 (1977) (habeas corpus jurisdiction of courts in the District); *Palmore* v. *United States*, *supra*, authority of courts in the District to entertain criminal prosecutions).

agency is immune from suit in the federal courts. *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 283-289 (1959) (Frankfurter, Harlan, & Whittaker, JJ., dissenting).[5] And only a few Terms ago, this Court clearly implied that a properly-established and congressionally-approved interstate agency would be entitled to invoke the Eleventh Amendment. *Lake Country*, 440 U.S. at 401.[6]

The federal Courts of Appeals furthermore have uniformly recognized that the States are fully entitled to create, by interstate compact, a multistate agency en-

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[5] In *Petty*, three Justices wrote approvingly of a State's right to limit its amenability to suit in federal or state court, in general or for particular purposes (359 U.S. at 276-277; opinion for the court by Douglas, J., joined by Warren, C.J., & Brennan, J.), and assumed that the compacting States could also do so by an interstate agreement (*id.* at 279), but concluded that the States involved there had in the compact waived their immunity. *Id.* at 279-283. Three Justices concurred only in the majority's conclusion that the States had waived their immunity, but did so without questioning the States' right to withhold such consent. *Id.* at 283 (Black, Clark & Stewart, JJ., concurring in the judgment). And, as noted above, three Justices both expressly recognized the States' right to create an interstate agency immune from suit in the federal courts and dissented from the majority's conclusion that the States involved had waived that immunity. *Id.* at 283-289 (Frankfurter, Harlan, & Whittaker, JJ., dissenting).

[6] The Court said:

> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. *Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose*, there would appear to be no justification for reading additional meaning into the limited language of the Amendment. [Emphasis added.]

Six members of the Court joined this statement. Justice Brennan said he would not reach the issue (440 U.S. at 406), and Justices Marshall and Blackmun dissented on other grounds. *Id.*

joying the immunity from suit under the Eleventh Amendment that an agency of any one of the signatories would enjoy. Thus, the Eighth, Second, and Ninth Circuits have squarely held that an interstate agency may invoke the Eleventh Amendment.[7] As the Second Circuit has noted, "[w]e fail to perceive any reason why a bi-state commission cannot, when sued in the federal court[s], enjoy the Eleventh Amendment immunity of its signatory states." *Trotman*, 557 F.2d at 38.[8] The federal District Courts that have ruled on this issue have also concluded that a genuine interstate agency may invoke the Eleventh Amendment.[9] In short, *every* federal

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[7] *Council of Commuter Org.* v. *Metropolitan Transp. Auth.*, 683 F.2d 663, 672 (2d Cir. 1982), *aff'g*, 515 F. Supp. 36, 37-38 (S.D.N.Y. 1981); *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1359-60 (9th Cir. 1977), *rev'd on other grounds sub nom. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Trotman* v. *Palisades Interstate Park Comm'n*, 557 F.2d 35, 37-38 (2d Cir. 1977); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857, 859-860 (8th Cir. 1958), *rev'd on other grounds*, 359 U.S. 275 (1959). *See also Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan Dist.*, 433 F.2d 131, 136-137 (8th Cir. 1970) (interstate agency immune from federal antitrust laws).

[8] While this Court reversed the Courts of Appeals in *Petty* and *Lake Country*, in each case the Court did so on other grounds, and in neither case did this Court question the States' ability to fashion immunity for a genuine interstate agency if clearly adopted as part of a compact and approved by Congress. *Petty* and *Lake Country* are discussed in notes 5 & 6, respectively, *supra*.

[9] *Council of Commuter Org.* v. *Metropolitan Transp. Auth.*, 515 F. Supp. 36, 37-38 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 663, 672 (2d Cir. 1982); *Wolkstein* v. *Port of New York Auth.*, 178 F. Supp. 209, 213-214 (D.N.J. 1959); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 153 F. Supp. 512, 513 (E.D. Mo. 1957), *aff'd*, 254 F.2d 857 859-860 (8th Cir. 1958), *rev'd on other grounds*, 359 U.S. 275 (1959); *Howell* v. *Port of New York Auth.*, 34 F. Supp. 797, 801 (D.N.J. 1940); *see also Rao* v. *Port of New York Auth.*, 122 F. Supp. 595, 597 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 362, 363 (2d Cir. 1955). *Compare Kozikowski* v. *Delaware River Port Auth.*, 397 F. Supp.

court that has considered this issue has ruled that an interstate agency may invoke the Eleventh Amendment's immunity where the founding interstate compact so provides.

This conclusion is fully consistent with this Court's interpretation of the purposes served by the Compact Clause: the prevention of the enhancement of state power at the expense of federal authority. *See, e.g., Cuyler* v. *Adams*, 449 U.S. at 439-440; *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 459-460, 471-472 (1978); *New Hampshire* v. *Maine*, 426 U.S. 363, 369-370 (1976). There is no threat to federal supremacy (or to other States) where, as here, the interstate agency granted immunity has been approved in that form by Congress. On the other hand, a constitutional rule preventing the States from creating such an agency may impede efforts at interstate cooperation in matters of regional concern.

Complex problems often fail to respect state lines. Matters such as waste disposal and transportation, to name but two, can often be handled successfully only through interstate cooperation. Interstate compacts are expressly contemplated by Article I, § 10, cl. 3, of the Constitution, and "perform[] high functions in our federalism, including the operation of vast interstate enterprises." *Petty*, 359 U.S. at 279; footnotes omitted. *See generally* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34

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1115, 1119-20 (D.N.J. 1975) (finding that particular interstate agency had waived immunity); *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618, 627-628 (S.D.N.Y. 1975) (finding that particular interstate agency not entitled under compact to claim immunity); *United States Steel Corp.* v. *Multistate Tax Comm'n*, 367 F. Supp. 107, 113-115 (S.D.N.Y. 1973) (relying upon *Ex parte Young*, 209 U.S. 123 (1908) to hold that interstate agency not entitled to claim immunity where plaintiff presents federal constitutional claim), *decision on merits*, 417 F. Supp. 795 (1976) (3-judge court), *aff'd on merits*, 434 U.S. 452 (1978).

Yale L.J. 685 (1925). Indeed, this Court on more than one occasion has recommended that the States turn to interstate compacts to resolve regional problems. *See, e.g., West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951); *New York* v. *New Jersey*, 256 U.S. 296, 313 (1921). While there may be little reason to permit two States by compact to bestow immunity upon a political subdivision of both that simply spans state lines, as *Lake Country* noted, there is no reason to handicap the States by denying them immunity simply because they have joined forces to address a legitimate concern of each State which, if the concern of only one, would not have required a waiver of immunity.

Finally, this conclusion is also consistent with the Eleventh Amendment, the sovereign immunity of the federal government, and Congress' authority under Articles I and III to regulate the jurisdiction of the federal courts. By its terms, the Eleventh Amendment bars suit against a State in any federal court, including this Court. *E.g., Duhne* v. *New Jersey*, 251 U.S. 311, 313 (1920). It is also well settled that the United States, its officers, and agencies may not be sued without the consent of the federal government. *E.g., Malone* v. *Bowdoin*, 369 U.S. 643 (1962); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949). And it is axiomatic that Congress could decline to authorize the lower federal courts to entertain suit, or to order relief, of any type against the States or the federal government. *E.g., Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850); *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). Because the States and federal government could separately create agencies immune from suit, and because Congress could refuse to abrogate the States' or federal government's immunity from suit in the federal courts altogether, an agreement between the States and Congress to grant such immunity to an interstate agency should be unquestionable.

2. The Court of Appeals also correctly recognized (App. 4a) that, in this case, there is the "good reason"

found lacking in *Lake Country* to believe that WMATA may legitimately claim such immunity. Because the WMATA Interstate Compact is an agreement between independent sovereigns, the text of the Compact itself must be the first, and most important, source of its meaning. *See Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 428-431 (1940) (interstate compact); *cf. Sumitomo Shoji America, Inc.* v. *Avagliano*, 102 S. Ct. 2374, 2377 (1982) (international treaty). The text of the WMATA Interstate Compact, like the text of the Transportation Act and Regulation Compact, specifically established WMATA as an interstate agency. Section 2 of the Compact identifies the purpose of the Compact as being, in part, the "creat[ion] [of] a regional instrumentality, as a common agency of each signatory party * * *", empowered to develop, finance, and operate a regional mass transit system. App. 15a-16a. Furthermore, as the Court of Appeals held (App. 4a), Section 4 of the Compact expressly creates the WMATA "as an instrumentality and agency of each of the signatory parties hereto * * *." App. 16a.[10] In addition, Section 78 acknowledges that "the creation * * * and the carrying out" of WMATA's purposes are "in all respects for the benefit of the people of the signatory states * * *," they are "for a public purpose * * *," and WMATA "will be performing an essential governmental function, including, without limitation, proprietary, governmental, and other functions * * *." App. 16a-17a. Finally, the text of the Compact clearly distinguishes between an "agency" and a "political subdivision," separately referring to these different instrumentalities over a dozen times.[11]

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[10] Section 1(d) of the Compact defines "'Signatory'" as "the State of Maryland, the Commonwealth of Virginia and the District of Columbia."

[11] Section 3 uses the term "political subdivision" to refer to Arlington and Fairfax Counties in Virginia, and to Montgomery and Prince George's Counties in Maryland. Thereafter, references to a "political subdivision" are frequently contrasted with refer-

The plain meaning of the text is confirmed by the construction given the Compact by its signatories. Decisions of the Virginia Supreme Court and the lower federal courts for Maryland and the District of Columbia have recognized WMATA as an arm of its signatories.[12] In the absence of any contrary indication in the legislative history, the plain meaning and construction by the signatories should control. *Cf. Avagliano*, 102 S. Ct. at 2380.

Furthermore, collateral evidence also supports this conclusion. WMATA is headed by directors appointed by the District of Columbia and state agencies from Maryland and Virginia. WMATA Compact § 5. Sovereign immunity is well-established in Maryland and Virginia.[13] Both States and their agencies enjoy absolute immunity from suit for money damages.[14] A state agency in each State is immune from any tort liability unless the State expressly waives its immunity; waiver will not be implied.[15]

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ences to an "agency," which is used to refer to state agencies in Maryland and Virginia. *See* Sections 12(e); 12(f); 12(h); 13(b); 14(a)(3); 14(c)(1) & (2); 20(a); 21; 29; 41; 62(b); 69(b); 70(a); 73(a); 75; 76; 82(a).

[12] *Potomac Electric Power Co.* v. *State Corp. Comm'n*, 221 Va. 632, 634-636, 272 S.E.2d 214, 215-216 (1980); *Board of Supervisors* v. *Massey*, 210 Va. 253, 254, 262, 169 S.E.2d 556, 557, 562 (1969); *City of Fairfax* v. *WMATA*, 582 F.2d 1321, 1323, 1329 (4th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979); *C. T. Hellmuth & Assoc., Inc.* v. *WMATA*, 414 F. Supp. 408, 409 (D. Md. 1976); *Birnberg* v. *WMATA*, 389 F. Supp. 340, 342 (D.D.C. 1975).

[13] *See, e.g., Austin* v. *City of Baltimore*, 286 Md. 51, 53, 405 A.2d 255, 256 (1979); *Virginia Electric & Power Co.* v. *Hampton Redevelopment & Housing Auth.*, 217 Va. 30, 32-33, 225 S.E.2d 364, 367 (1976).

[14] *See, e.g., Katz* v. *Washington Suburban Sanitary Comm'n*, 284 Md. 503, 508 n.3, 397 A.2d 1027, 1030 n.3 (1979); *Virginia Electric & Power Co.*, 217 Va. 30, 225 S.E.2d 364.

[15] *See, e.g., Board of Trustees of Howard College* v. *John K. Ruff, Inc.*, 278 Md. 580, 588-589, 366 A.2d 360, 364-365 (1976); *Katz*, 284 Md. at 508-509, 397 A.2d at 1030; *Elizabeth River Tunnel Dist.* v. *Beecher*, 202 Va. 452, 456-457, 117 S.E.2d 685, 689 (1961).

The WMATA Compact retained this complete immunity for all governmental actions performed by WMATA, waiving immunity only for proprietary actions. WMATA Compact § 80; App. 17a. Absent this limited waiver, the Compact therefore grants WMATA the same sovereign immunity that the agencies of each signatory enjoys. Moreover, WMATA receives funding from the federal government, state agencies in Maryland and Virginia, and the localities served by WMATA. This Compact therefore also exhibits the collateral elements of intent found lacking in *Lake Country*, 440 U.S. at 401-402.

As sovereigns entitled to invoke the immunity from suit guaranteed by the Eleventh Amendment as well as by their own doctrines of sovereign immunity, Maryland and Virginia were well within their right, in creating WMATA, to specify the courts, if any, in which WMATA could be sued. The signatories permitted suit in the federal District Courts for Maryland, Virginia, and the District, as well as in state courts in Maryland and Virginia, and also provided for the right to remove any case filed in state court to the appropriate federal court. By so doing, the signatories were able to avoid the possibility that WMATA would be subject to prejudice by virtue of its status. Because Maryland and Virginia were both signatories, permitting WMATA to be sued in state court did not pose the likelihood that suits against WMATA would be perceived as concerning only another sovereign. To avoid that concern completely, the opportunity to remove a suit from state to federal court was added, as was the right to bring suit in any one of the applicable federal courts.

But the District of Columbia in 1966 was governed by Congress, not the States. If WMATA could be sued in the District, it would not be protected by having the suit tried either in the courts of one of the state signatories or before federal judges, free from influence by Congress. Instead, WMATA would be subject to suit in courts and before judges entirely subject to congressional control.

Hence, viewed in its historical context, excluding the local courts of the District makes eminent sense.

3. Nonetheless, the court below felt compelled to deny WMATA immunity from suit because of *Nevada* v. *Hall*, 440 U.S. 410. App. 4a. In so concluding, however, the court below misapplied that decision and thereby produced an altogether anomalous result.

The issue presented in *Hall* was whether, absent an interstate agreement or federal law to the contrary (*id.* at 414 n.5), "a State may claim immunity from suit in the courts of *another State* * * *" (*id.* at 414; emphasis added), a question this Court answered in the negative. *Hall* simply recognized that Article III did not disturb the relationship of sovereign independence that the States enjoyed *inter se* prior to the adoption of the Constitution, and that neither *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), nor the Eleventh Amendment was concerned with such matters. 440 U.S. at 418-421. But that answer does not control this case because "[t]he District of Columbia is constitutionally distinct from the States * * *" (*Palmore* v. *United States*, 411 U.S. at 395) and is, instead, subject to the plenary control of the federal government.[16] Neither *Nevada* v. *Hall* nor any other decision of this Court has ever considered the question pre-

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[16] Most of the plaintiffs in the seven cases decided by the court below were residents of the District of Columbia. *E.g.*, Complaint in *Carter* v. *WMATA*, CA No. 8418-77 (D.C. Super. Ct. 1977) p. 1. In two cases, however, the plaintiff was a resident of Maryland. *E.g.*, Complaint in *Artis* v. *WMATA*, CA No. 13485-79 (D.C. Super. Ct. 1979) p. 1. It would, of course, be anomalous to hold that the Eleventh Amendment barred suit against WMATA if brought by a resident of a State but did not bar suit if brought by a resident of the District of Columbia.

Moreover, there is in this case, unlike *Hall*, a "federal statute" (440 U.S. at 414 n.5) limiting the jurisdiction of the local District of Columbia courts, in addition to the Eleventh Amendment: the WMATA Interstate Compact, discussed at pp. 24-28, *infra*.

sented here. But history, this Court's prior decisions, and reason support an affirmative answer.

a. The Framers of Article III and the Eleventh Amendment were evidently concerned with insuring that the States, where they could be sued in federal court at all, could only be sued before a tribunal bearing the constitutionally recognized guarantees of judicial impartiality.

Framers of the Constitution such as James Madison, John Marshall, and Alexander Hamilton interpreted Article III as retaining a State's immunity from suit by private parties in federal courts. *The Federalist*, No. 81, p. 508 (A. Hamilton) (H. Lodge ed. 1908); 3. J. Elliot, *Debates on the Federal Constitution*, p. 533 (1876) (James Madison); *id.* at pp. 555-556 (John Marshall); *see Nevada* v. *Hall*, 440 U.S. at 419 & n.16; *id.* at 435-436 & n.3 (Rehnquist, J., joined by Burger, C.J., dissenting). At the same time, Framers such as Edmund Randolph and James Wilson believed that Article III, § 2, cl. 1, granted the federal courts jurisdiction over "Controversies * * * between a State and citizens of another State" to insure that disputes involving the States could be resolved before a tribunal whose impartiality was guaranteed by the life tenure and irreducible compensation provisions of Article III. *North Dakota* v. *Minnesota*, 263 U.S. 365, 372-373 (1923); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 289 (1888). *See also The Federalist*, *supra*, No. 81, pp. 507-508 (A. Hamilton). The Hamiltonian position, though initially rejected in *Chisholm*, was ultimately vindicated with the adoption of the Eleventh Amendment.

No one suggested several decades prior to the first decision upholding Congress' creation of an Article I court—*American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828)—that different principles would apply to those courts. It is unquestionable, therefore, that the Framers of both Article III and the Eleventh Amendment would have found quite curious the notion that Article I left

Congress with a mechanism for out-flanking their obvious designs.

b. Several decisions of this Court compel the conclusion that a resident of the District of Columbia may not circumvent a State's Eleventh Amendment immunity by the simple expedient of bringing suit in an Article I court.

This Court has not given a crimped, literalistic interpretation to the Eleventh Amendment, but has repeatedly interpreted its scope in light of its underlying principles that a "state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment" (*Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 51 (1944); emphasis added), and that, absent consent, a State "cannot be sued *in any court*, by any person, for any cause of action whatever." *Hopkins* v. *Clemson Agric. College*, 221 U.S. 636, 642 (1911); emphasis added. On the one hand, in *Hans* v. *Louisiana*, 134 U.S. 1 (1890) (suit by state citizen), *Smith* v. *Reeves*, 178 U.S. 436 (1900) (suit by a federally-chartered corporation), and *Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suit by a foreign nation), this Court flatly rejected the notion that the Framers of the Eleventh Amendment would have acquiesced in a suit brought against a State by a party not specifically identified in the text of the Amendment.[17] "It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." *Hans*, 134 U.S. at 15 (*quoted in Smith*, 178 U.S. at 447, *and in Monaco*, 292 U.S. at 326).[18] On the other hand, this

[17] The Amendment also bars suit brought against a state officer or agency (*Cory* v. *White*, 102 S. Ct. 2325 (1982); *Alabama* v. *Pugh*, 438 U.S. 781 (1978)), notwithstanding the textual limitation to suits "commenced or prosecuted against *one of the United States* * * *," and the Amendment bars suits in admiralty against a State (*In re New York*, 256 U.S. 490 (1921)), notwithstanding the textual limitation to "any suit in *law or equity* * * *."

[18] *Hans* then continued, as also quoted in *Smith* and *Monaco*:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a

Court's respect for the principle of sovereign immunity has not been limited to suits against States in Article III courts. In *Kawananakoa* v. *Polyblank*, 205 U.S. 349 (1907), and *Porto Rico* v. *Castillo*, 227 U.S. 270 (1913), this Court held that territorial governments were entitled to invoke sovereign immunity when sued in territorial courts created by Congress under Article IV, § 3, cl. 2. In light of these decisions, the anomaly created by the decision below is manifest.

That decision also conflicts with this Court's requirement of a clear, unambiguous statement of congressional intent to abrogate a State's immunity. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Employees* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973); *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964). Such a clear statement is especially necessary in a case such as this where the legislation allegedly doing so is enacted *after* the interstate agency has been created *with congressional assent*. Congress' subsequent decision to establish Article I courts for the District does not, by that fact alone, suggest an accompanying intent to force the States to stand as defendants in those courts. Absent specific congressional

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State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended it to a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face. [134 U.S. at 15.]

The only exceptions to the rule that the Eleventh Amendment bars *any* plaintiff from suing a State in a federal court are those "where there has been 'a surrender of this immunity in the plan of the [constitutional] convention'" (*Monaco*, 292 U.S. at 322-323 (quoting *The Federalist*, No. 81, p. 487 (A. Hamilton)), as where the plaintiff is another State (*e.g.*, *Virginia* v. *West Virginia*, 206 U.S. 290, 319 (1907)) or the United States. *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965).

legislation clearly abrogating a State's immunity, or a State's voluntary waiver—neither of which is present here—the Eleventh Amendment should limit the authority of those courts to entertain such suits, regardless of the breadth of authority such a court may, constitutionally, otherwise enjoy.

c. Finally, denying the States immunity from suit in Article I courts is wholly unreasonable. As Professor David Currie has pointedly asked, "do you really believe the storm over *Chisholm* v. *Georgia* was over so trivial a matter as the choice of forum?" D. Currie, *Federal Courts*, p. 573 (2d ed. 1975). The Eleventh Amendment granted the States immunity from suit at the hands of Article III courts—the only federal courts contemplated by the Framers—because of the States' concern with their sovereign immunity and the authority of federal courts. The same concerns are applicable to Article I courts, like those in the District. But of additional importance is that Article I courts are subject to congressional control, as Article III courts are not. Because the Framers of the Eleventh Amendment would have been doubly concerned with courts of this character, the conclusion that they would have considered Article I courts within the scope of "the Judicial Power" restrained by the Eleventh Amendment is ineluctable.

4. It is also quite clear that WMATA has never waived its immunity, and that Congress has never adopted legislation clearly abrogating WMATA's immunity. The text of Section 81 of the Compact specifically omits the local courts of the District from those given subject matter jurisdiction over tort suits against WMATA. App. 18a. Unlike the clause considered in the leading case on an interstate agency's waiver of its immunity, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, *supra*, whose terms authorized suit in "*any* court * * * of the United States" (359 U.S. at 281; emphasis added), the WMATA Interstate Compact limited WMATA's ability to be sued to

specific courts, a practice *Petty* noted with approval. *Id.* at 276-277. *See also Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 579 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 465 (1945). The Compact therefore supports WMATA's claim of immunity from suit.

### C. The WMATA Interstate Compact

The foregoing discussion makes plain why the signatories to the WMATA Compact would have intended to exclude the local District of Columbia courts from those granted subject matter jurisdiction by the Compact, and also heightens the need to analyze with care the provisions of that Compact authorizing suit, a step that the court below failed to take.

1. The court below fastened upon Section 81's failure to use the term "exclusive" in its grant of jurisdiction. App. 5a-6a. But in so doing, the court missed the obvious import of the specific reference in Section 81 to five of the six potential courts. Section 81 not only authorized suit without any restriction in the United States District Courts for Maryland, Virginia, and the District, but also authorized suit in *all* the "Courts of Maryland and Virginia," some of which, like the Court of General Sessions in the District, also had monetary ceilings on their jurisdiction. *See* Md. Code Ann. [Courts and Judicial Proceedings] § 4-401 (1980) (Maryland District Court); Va. Code Ann. § 16.1-77 (1982) (Virginia General District Court). Section 81, therefore, clearly modified the jurisdictional rules for *five* of the *six* applicable courts, granting them jurisdiction to entertain suits like these. Had the signatories also intended to permit suit in the District of Columbia Court of General Sessions, it would have been easy to do so. By specifying the particular courts in which WMATA could be sued, without regard to the amount in controversy or any other jurisdictional requirements, Section 81 necessarily barred any other courts from exercising subject matter jurisdiction over

WMATA. Accordingly, the signatories' failure to add the term "exclusive" to Section 81 is of no moment.

Indeed, by basing its interpretation of Section 81 upon language that does *not* appear in that provision, rather than upon the language that does, the court below effectively rewrote the Compact to authorize suit against WMATA in *any* court. Not only does that construction render superfluous the specific enumeration of five of the six potential courts, but it is also at odds with Congress' settled practice of explicitly authorizing suit against an interstate agency in "any court" when Congress so intends.[19] The misinterpretation of Section 81 by the court below is therefore manifest.

2. Because the WMATA Interstate Compact excluded the local District of Columbia courts from those otherwise given subject matter jurisdiction, the only remaining question should be whether the 1970 Court Reform Act modified the terms of the Compact. That it did not, either explicitly or implicitly, is true for several reasons.

First, neither the text nor the legislative history of the Act mentions the WMATA Interstate Compact. The only reference to WMATA is found in D.C. Code Ann. § 11-924 (1981), which simply gives the Superior Courts *criminal* jurisdiction over persons who violate WMATA's Rules and Regulations. *Compare Hubbell* v. *United*

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[19] *See* Kansas City Area Transportation Compact (Kansas-Missouri), § 2(b), Pub. L. No. 89-599, 80 Stat. 826, 829 (1966) ("any court * * * of the United States"); Bear River Compact, Art. III(C)(4), Pub. L. No. 85-348, 72 Stat. 38, 41 (1958) ("[s]ue and be sued * * * in any court of record of a signatory State, and in any court of the United States having jurisdiction of such action"); Tennessee-Missouri Bridge Commission Compact, ch. 758, 63 Stat. 930 (1949) ("any court * * * of the United States"; discussed in *Petty, supra*). *See also* Klamath River Basin Compact, Art. XII(B), Pub. L. No. 85-222, 71 Stat. 497, 506 (1957) (authorizing signatory States to sue "in any court of competent jurisdiction"); Yellowstone River Compact, Art. XIII, ch. 629, 65 Stat. 663, 669 (1951) (same for "any Federal court or the United States Supreme Court").

*States*, 289 A.2d 879 (D.C. 1972), *with District of Columbia* v. *Solomon*, 275 A.2d 204 (D.C. 1971). By this section, Congress demonstrated that it was well aware of WMATA's unique status when it considered and passed the 1970 Court Reform Act and knew how to refer specifically to WMATA when it wished to do so. And by providing for only criminal jurisdiction, Congress necessarily excluded civil jurisdiction.

Second, when Congress intended to transfer jurisdiction from the United States District Courts to the Superior Courts, Congress manifested that intent explicitly, not leaving its intent to inference or implication. Thirty-three provisions of the Court Reform Act, Sections 141 through 173, contain conforming amendments, modifying the District and federal codes by adding the term "Superior Court" and expressly endowing that court with jurisdiction. 84 Stat. 551-592; *see* Addendum to Brief for Appellee WMATA in the Court of Appeals, pp. 37-78. Many of these provisions expressly transfer jurisdiction from the United States District Court to the Superior Courts.[20] But the Court Reform Act nowhere mentions the WMATA Compact. In fact, the Court Reform Act expressly reserved for the federal courts those matters in which the federal courts had exclusive jurisdiction. *See* D.C. Code Ann. § 11-921. Because Section 81 of the Compact so invested the federal courts, the Act, by its terms, carried through the effect of Section 81.

Finally, suits involving WMATA were not of the type that Congress intended to transfer from the federal to the local courts. As we have shown, Maryland and Virginia were well within their office in specifying in which courts,

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[20] For example, Section 155(c) lists 55 acts in the District Code in which "Superior Court" is substituted for the "United States Court." Section 157, entitled "Miscellaneous Amendments Relating to Transfers of Jurisdiction," lists 8 separate acts for which jurisdiction is transferred from the federal to the local courts.

if any, this agency would be subject to suit. Nothing in the legislative history of the Act suggests, much less stands as the clear statement this Court has required in other circumstances (*e.g.*, *Edelman* v. *Jordan*, *supra*), that, by reorganizing the local court system, Congress also intended to exercise its authority to modify the handiwork of the States of Maryland and Virginia. Thus, there is no reason to conclude that Congress intended to modify the WMATA Interstate Compact.

If the Court Reform Act did not expressly repeal the jurisdictional limits established in WMATA Compact Section 81, neither did it do so by implication. As a general rule, "repeals by implication are not favored" (*Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). The Court Reform Act is readily reconcilable with—indeed, is best read as being wholly consistent with—Section 81 of the Compact. The Court Reform Act therefore cannot be read as repealing Section 81 by implication.

There is one final point. The WMATA Interstate Compact was solemnly entered into by two sovereign States, the District of Columbia, and Congress. Even if Congress has the constitutional *power* subsequently to change such a Compact without the concurrence of the signatory States, such a change should not lightly be inferred—in fact, should not be *inferred* at all.[21] Maryland and Vir-

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[21] *Cf. Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" for "[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice [of participating in a federally funded program] knowingly, cognizant of the consequences of their participation"; relying upon *Edelman*, *supra*, and *Employees*, *supra*;

ginia approved the Compact based on the plain meaning of its terms. The question of which courts would be adjudicating disputes under the Compact undoubtedly was a serious one for them in their decision to approve. For the local courts of the District now to arrogate to themselves the ability to adjudicate such disputes, squarely in the face of the agreed-upon language in the Compact, represents an affront to the sovereignty of the States that should not be countenanced.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of certiorari to reverse the judgment below.

Respectfully submitted,

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footnote omitted); *accord, Board of Educ.* v. *Rowley*, 102 S. Ct. 3034, 3049-50 n.26 (1982). Because an interstate compact is, fundamentally, an agreement between States rather than between a State and the federal government, this "clear voice" requirement applies with even more force, especially where it is claimed that Congress has modified the terms of a previously-approved interstate compact.

## APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

Nos. 81-1344, 81-1476, 81-1613,
81-1616, 82-56, 82-301, and 82-345

ROBERTO QASIM, *et al.*,
*Appellants,*

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*,
*Appellees.*

[Filed Mar. 2, 1983]

Before: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

On consideration of appellees' motion for a stay of the mandate pending application for certiorari and the supplemental exhibit in support thereof, and it appearing that the majority of the judges of this court has voted to deny the aforesaid motion, it is

ORDERED that appellees' motion is denied.

PER CURIAM

[Service list omitted in printing]

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* Associate Judge Nebeker would vote to grant the motion.

## APPENDIX B

## DISTRICT OF COLUMBIA COURT OF APPEALS

ROBERTO QASIM (No. 81-1344),
SALLIE C. BAKER (No. 81-1616),
ANNIE CARTER (No. 81-1613),
FRANCES C. GREEN (No. 82-345),
OLEON JONES (No. 81-1476),
and
WILLIE JAMES ARTIS (No. 82-301),
*Appellants,*

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, ET AL.,
*Appellees.*

(Hon. Tim Murphy, Trial Judge)

On Petition for Hearing En Banc

(Argued en banc December 6, 1982
Decided January 26, 1983)

*Albert H. Turkus* for appellants. *Robert Cadeaux* was on the brief for appellant Qasim. *John T. Coyne* and *David P. Durbin* entered appearances for appellant Qasim. *James C. Beadles* was on the brief for appellant Jones. *Patrick J. Christmas* was on the brief for appellant Carter. *Roger C. Johnson* was on the brief for appellant Artis. *Jack H. Olender* and *Harlow R. Case*, on behalf of appellant Green, adopted briefs of appellants Qasim and Carter. *Michael A. Pace*, *Albert H. Turkus* and *Timothy J. O'Rourke* were on the joint reply brief for appellants.

*Vincent H. Cohen*, with whom *Robert B. Cave*, *Don F. Ryder, Jr.*, and *Andrew E. Bederman* were on the briefs, for appellees.

Before NEWMAN, *Chief Judge*, and KELLY, KERN, NEBEKER, MACK, FERREN, PRYOR, BELSON, and TERRY, *Associate Judges*.

Opinion for the court by *Chief Judge* NEWMAN.

Concurring opinion by *Associate Judge* FERREN at p. 7.

NEWMAN, *Chief Judge*: In this en banc review we consider decisions of the Superior Court dismissing these now consolidated tort claims for lack of subject matter jurisdiction. We conclude that the Superior Court has jurisdiction, concurrent with that of the United States District Court, over actions involving the Washington Metropolitan Area Transit Authority (hereinafter WMATA).

I

Appellants, the plaintiffs below, commenced these actions individually against WMATA in the Superior Court for damages for personal injuries allegedly resulting from the negligence of WMATA. WMATA denied all allegations of negligence and, midway through the litigation in each case, moved the court to dismiss these actions for lack of subject matter jurisdiction. WMATA's motions were based on the Washington Metropolitan Area Transit Authority Compact (hereinafter the Compact), the interstate compact that created WMATA. Section 80 of the Compact provided a limited waiver of immunity from liability for contracts and torts. Section 81 provided that "[t]he United States District Courts shall have original jurisdiction, concurrent with the courts of Maryland and Virginia, of all actions brought by or against the Authority." In each of the cases, the Motion to Dismiss was granted. The appeals of these decisions were consolidated in the spring of 1982. Appellants then filed a petition for an initial en banc hearing which was granted in October 1982.

## II

Section 4 of the Compact expressly establishes WMATA as an agency of each sovereign signatory to the Compact. As such, WMATA contends it is clothed with the sovereign immunity granted by the eleventh amendment to its parent states. *Cf. Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Sovereign immunity shields a sovereign from suit in its own courts unless the sovereign consents to suit. This doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). However, the doctrine does not bestow immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign. Immunity in the courts of another sovereign "must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Nevada v. Hall*, 440 U.S. 410, 416 (1979). The WMATA Compact contains no agreement, express or implied, granting immunity to a signatory from suits involving WMATA brought in the courts of the other two signatories. Thus Maryland and Virginia do not have sovereign immunity from suits brought in the District of Columbia courts.

Section 80 of the Compact waives each signatory's immunity from suit in its own courts for "any proprietary functions, in accordance with the laws of the applicable signatory." Provision of mass transportation under the auspices of three governmental bodies is such a function. Thus, Section 80 vests the courts of Maryland, Virginia and the District of Columbia with jurisdiction to entertain tort claims, such as these here, resulting from the allegedly negligent operation of WMATA vehicles.[1]

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[1] Section 80 also states that WMATA "shall not be liable for any torts occurring in the performance of a governmental function."

## III

Jurisdiction of federal district courts over WMATA matters was established in § 81. In § 81, the United States District Courts were granted original jurisdiction, which they otherwise would not enjoy, over all actions involving WMATA. This grant of jurisdiction had a different effect on the United States District Courts located in Maryland and Virginia than it did on the federal district court located here. Section 81 operated to give the former jurisdiction over suits against WMATA—suits that otherwise would have been local matters—without regard to diversity of citizenship or to the amount in controversy.

The United States District Court for the District of Columbia had a unique bifurcated role in 1966, the year the Compact was enacted. It was a court of general jurisdiction as well as federal jurisdiction, with the power to hear all local claims that alleged more than $10,000 in damages. *See Palmore v. United States*, 411 U.S. 389, 392 n.2 (1973). Consequently, § 81 had a different effect on its jurisdiction. The District Court for the District of Columbia did not need an independent grant of jurisdiction to empower it to hear WMATA actions. In its capacity as a court of general jurisdiction for the District of Columbia, it could already hear WMATA actions that met the $10,000 requirement. We conclude that all § 81 did to the United States District Court for the District of Columbia was to eliminate the $10,000 threshold for actions involving WMATA.

## IV

The crux of this case is the significance of the failure of § 81 to mention the Court of General Sessions, predecessor of the Superior Court, in the delineation of courts with jurisdiction over WMATA actions. Appellees suggest that the failure of § 81 to mention the Court of General Sessions granted exclusive jurisdiction to the

District Court for cases arising in the District of Columbia. We reject this contention and hold that the grant of jurisdiction of § 81 is concurrent and empowers the federal courts, along with the court of general jurisdiction in the District of Columbia, to hear WMATA actions.

Concurrent jurisdictional grants to federal and state courts are common and exclusive federal jurisdiction has been the exception. Concurrent jurisdiction has been affirmed unless expressly excluded or is in special cases incompatible due to their special nature. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). Thus we look to appellees to make a persuasive argument that the Superior Court lacks subject matter jurisdiction. There are three ways this could be done: by explicit statutory directive, by unmistakable implication for legislative history, or by a clear incompatibility between state court jurisdiction and federal interests. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). Appellees can make no argument to contravene the grant of concurrent jurisdiction in any of these ways.

There is no explicit statutory directive precluding Superior Court subject matter jurisdiction in this case. D.C. Code § 11-921 (1981) gives the Superior Court plenary jurisdiction over all civil actions brought in the District of Columbia, *Reichman v. Franklin Simon Corp.*, 392 A.2d 9, 12 (D.C. 1978), and no limiting language appears in this jurisdictional grant to preclude jurisdiction over actions involving WMATA. Section 81 does not confine jurisdiction to the federal courts either. Both the Maryland and Virginia state courts can hear cases involving WMATA. And the omission of the Court of General Sessions from a related jurisdictional grant in the Compact has been held not to bar jurisdiction. *See District of Columbia v. Solomon*, 275 A.2d 204, 205 (D.C. 1971). Thus neither § 81 nor the D.C. Code, nor judicial interpretation of these statutes, explicitly prevents the local court system from exercising jurisdiction over WMATA.

Similarly, there is no unmistakable implication from the legislative history of the Compact that Congress intended to preclude the District of Columbia's local court system from exercising jurisdiction. To the contrary, the Compact extended the jurisdiction of the court of general jurisdiction in the District of Columbia, which at that time was the United States District Court, to encompass WMATA actions for under $10,000. Furthermore, there is no evidence from the legislative history of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970), that indicates Congress intended to withdraw jurisdiction over WMATA matters from the local courts. Rather, the explicit purpose of that Act was to create one Superior Court with jurisdiction equivalent to that of a state court.

Finally, there is no clear incompatibility between Superior Court jurisdiction and federal interests. Local courts are considered compatible since the state courts of Maryland and Virginia, systems virtually identical to the District's in scope, have jurisdiction. Additionally, if Congress had perceived such an incompatibility between this jurisdiction's handling of WMATA cases and federal interests, it would have acted long ago to prevent the local court from exercising subject matter jurisdiction over these claims. Thus we hold that jurisdiction of the federal court is concurrent with that of the Superior Court.

*Reversed.*

FERREN, *Associate Judge*, concurring: I concur in *Chief Judge* NEWMAN'S opinion for the court. I write separately, however, to clarify an ambiguity. The opinion of the court states at the beginning of Part II:

> Section 4 of the Compact expressly establishes WMATA as an agency of each sovereign signatory to the Compact. As such, WMATA contends it is

> clothed with the sovereign immunity granted by the eleventh amendment to its parent states. *Cf. Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

I understand this statement to mean that we assume solely for the sake of argument—we do not decide—that WMATA is entitled to sovereign immunity pursuant to the guidelines in *Lake County Estates, Inc., supra.*

## APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 6341-78

ROBERTO QASIM, SAUDAH QASIM,
*Plaintiffs,*
v.
W.M.A.T.A. and D. M. REEDER,
*Defendants.*

[Filed Nov. 6, 1981]

ORDER

This Court having been assigned to the Motions Division for the final chapter of the 1981 Calendar, and being advised that this case was to be scheduled to be heard during that period, and the Court having reviewed the pleadings in the case and having concluded, pursuant to SCR 12-I(i), that oral argument is not necessary, it is hereby

ORDERED that defendants' Motion to Dismiss be and hereby is GRANTED; and it is further

ORDERED that the above-captioned matter be and hereby is DISMISSED.

SO ORDERED.

/s/ Tim Murphy
TIM MURPHY
Judge

Date: November 5, 1981

[Certificate of service omitted in printing]

## APPENDIX D

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 3505-79

SALLIE C. BAKER,
*Plaintiff*
v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*,
*Defendants*

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Civil Action No. 7272-79

CLARENCE E. TAYLOR,
*Plaintiff*
v.

DISTRICT OF COLUMBIA, *et al.*,
*Defendants*

[Filed Nov. 25, 1981]

ORDER

This matter came before the Court on the defendant WMATA's Motion to Dismiss. Having considered the motion and memorandum in support thereof, the Court this 25th day of November, 1981, hereby:

ORDERS, that the defendant WMATA's Motion to Dismiss be, and is hereby granted; and it

FURTHER ORDERS, that the above-captioned matter be, and is hereby dismissed, as to defendant WMATA.

/s/ Judge Murphy
JUDGE MURPHY
Judge

[Service list omitted in printing]

## APPENDIX E

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 8478-77

ANNIE CARTER,
*Plaintiff*

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
*Defendant*

[Filed Dec. 4, 1981]

### ORDER

This matter came before the Court on the defendant WMATA's Motion to Dismiss. Having considered the motion and memorandum in support thereof, the Court this 4th day of December, 1981, hereby:

ORDERS, that the defendant's Motion to Dismiss be, and is hereby granted; and it

FURTHER ORDERS, that the above-captioned matter be, and is hereby dismissed.

/s/ Judge Murphy
JUDGE MURPHY
Judge

[Service list omitted in printing]

## APPENDIX F

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 16861-80

FRANCES C. GREEN,
*Plaintiff,*

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
*Defendant.*

ORDER

This matter having come before the Court on defendant's Motion to Dismiss and the Court having taken the matter under advisement to allow the plaintiff to submit an Opposition thereto, and the Court having reviewed the submitted pleadings, it is hereby

ORDERED that the defendant's Motion to Dismiss be and hereby is GRANTED for the reasons set forth in the defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss, and it is further

ORDERED that the plaintiff's complaint be and hereby is DISMISSED Without Prejudice to the action being brought in the United States District Court for the District of Columbia.

SO ORDERED.

/s/ Tim Murphy
TIM MURPHY
Judge

Date: February 12, 1982

[Certificate of service omitted in printing]

## APPENDIX G

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 12392-79

OLEON JONES,
*Plaintiff*

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
*Defendant*

[Filed Nov. 30, 1981]

### ORDER

This matter came before the Court on the defendant WMATA's Motion to Dismiss. Having considered the motion and memorandum in support thereof, the Court this 30th day of November, 1981, hereby:

ORDERS, that the defendant's Motion to Dismiss be, and is hereby granted; and it

FURTHER ORDERS, that the above-captioned matter be, and is hereby dismissed.

/s/ Judge Murphy
JUDGE MURPHY
Judge

[Service list omitted in printing]

**APPENDIX H**

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 13485-79

WILLIE JAMES ARTIS,
*Plaintiff,*

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
*Defendant.*

ORDER

This matter having come before the Court on defendant's Motion to Dismiss and the Court having taken the matter under advisement to allow the plaintiff to submit an Opposition thereto, and the Court having reviewed the submitted pleadings, it is hereby

ORDERED that the defendant's Motion to Dismiss be and hereby is GRANTED for the reasons set forth in the defendant' Memorandum of Points and Authorities in Support of Motion to Dismiss, and it is further

ORDERED that the plaintiff's complaint be and hereby is DISMISSED Without Prejudice to the action being brought in the United States District Court for the District of Columbia.

SO ORDERED.

/s/ Tim Murphy
TIM MURPHY
Judge

Date: February 12, 1982

[Certificate of service omitted in printing]

## APPENDIX I

### RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8, cl. 9, provides:

> The Congress shall have Power * * * To constitute Tribunals inferior to the Supreme Court;

Article I, § 10, cl. 3, provides, in pertinent part:

> No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *

Article III, § 1, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, as stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 2 of the WMATA Interstate Compact reads as follows:

> "PURPOSE
>
> "2. The purpose of this Title is to create a regional instrumentality, as a common agency of each signatory party, empowered, in the manner herein-

after set forth, (1) to plan, develop, finance and cause to be operated improved transit facilities, in coordination with transportation and general development planning for the Zone, as part of a balanced regional system of transportation, utilizing to their best advantage the various modes of transportation, (2) to coordinate the operation of the public and privately owned or controlled transit facilities, to the fullest extent practicable, into a unified regional transit system without unnecessary duplicating service, and (3) to serve such other regional purposes and to perform such other regional functions as the signatories may authorize by appropriate legislation.

Section 4 of the WMATA Interstate Compact reads as follows:

"WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

"4. There is hereby created, as an instrumentality and agency of each of the signatory parties hereto, the Washington Metropolitan Area Transit Authority which shall be a body corporate and politic, and which shall have the powers and duties granted herein and such additional powers as may hereafter be conferred upon it pursuant to law.

Section 78 of the WMATA Interstate Compact reads as follows:

"TAX EXEMPTION

"78. It is hereby declared that the creation of the Authority and the carrying out of the corporate purposes of the Authority is in all respects for the benefit of the people of the signatory states and is for a public purpose and that the Authority and the Board

will be performing an essential governmental function, including, without limitation, proprietary, governmental and other functions, in the exercise of the powers conferred by this Title. Accordingly, the Authority and the Board shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon it activities in the operation and maintenance of any transit facilities or upon any revenues therefrom and the property and income derived therefrom shall be exempt from all federal, State, District of Columbia, municipal and local taxation. This exemption shall include, without limitation, all motor vehicle license fees, sales taxes and motor fuel taxes.

Section 80 of the WMATA Interstate Compact reads as follows:

"LIABILITY FOR CONTRACTS AND TORTS

"80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone or any immunity from suit.

Section 81 of the WMATA Interstate Compact reads as follows:

"JURISDICTION OF COURTS

"81. The United States District Court shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority, and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

## APPENDIX J

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001

(202) 638-7113

Nos. 81-1344, 81-1476, 81-1613, 81-1616,
82-56, 82-301, and 82-345

ROBERTO QASIM, *et al.*,
*Appellants,*

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*,
*Appellees.*

[Filed Mar. 8, 1983]

Before: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

ORDER

It is ORDERED, *sua sponte*, that the caption of this court's opinion and judgment filed January 26, 1983, is amended by including therein:

No. 82-56:

SANDRA C. BUTTERFIELD, *et al.*,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

CA 16938-80

PER CURIAM

[Service list omitted in printing]

No. 82-1540

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
*Petitioners,*

v.

ROBERTO QASIM, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the District of Columbia Court of Appeals**

## BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: April 15, 1983
**Counsel of Record*

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment to the Constitution of the United States bars suit against an interstate agency in the Superior Court of the District of Columbia because that court was created under Article I, when the agency has waived its asserted sovereign immunity for tort claims arising from its proprietary functions, consented to suit in the United States District Courts, consented to suit in a court exercising Article I as well as Article III powers, consented to suit in accordance with the law of the District of Columbia, and engaged in litigation in the Superior Court for more than a decade.

2. Whether the District of Columbia Court of Appeals was correct in holding that language in an interstate compact giving the United States District Courts "original" jurisdiction over actions against the agency created by the compact may not be read as an exclusive jurisdictional grant precluding concurrent jurisdiction in the District Court and Superior Court over tort claims against the agency arising under local law.

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## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1540

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,

*Petitioners,*

v.

ROBERTO QASIM, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the District of Columbia Court of Appeals**

## BRIEF FOR RESPONDENTS IN OPPOSITION

## OPINION BELOW

The Opinion of the District of Columbia Court of Appeals, sitting *en banc,* has now been reported at 455 A.2d 904 (D.C. 1983)(*en banc* )("*Opinion*" ).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth as Appendix A (App.1a *et seq.* ) herein.

## COUNTERSTATEMENT OF THE CASE

By its petition for certiorari, the Washington Metropolitan Area Transit Authority ("WMATA") [1] asks this Court to review a unanimous *en banc* decision of the District of Columbia Court of Appeals which holds only that common law tort actions against WMATA may be brought in the Superior Court of the District of Columbia.

The Opinion below decided seven cases, all of which presented the same legal issues and had been consolidated on appeal in the District of Columbia Court of Appeals. In each case the plaintiff had filed a complaint in the Superior Court of the District of Columbia seeking money damages for personal injuries sustained in the District of Columbia, allegedly resulting from the negligence of WMATA and various co-defendants. In each case, WMATA admitted subject-matter jurisdiction in the Superior Court, but then late in the litigation moved to dismiss the actions on the ground that subject-matter jurisdiction was lacking. The seven cases reviewed by the District of Columbia Court of Appeals were all decided by the same Superior Court judge, and in each case that judge granted WMATA's motion to dismiss.[2]

The unanimous decision of the Court of Appeals reversing these dismissals confirmed prior Superior Court precedent and longstanding judicial practice in the District of Columbia. As noted by United States District Judge Gerhard A. Gesell,

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[1] WMATA is an interstate agency created by a compact between Maryland, Virginia, and the District of Columbia, and resides in all three areas for purposes of jurisdiction and venue. *See* Pub. L. No. 89-774, 80 Stat. 1324 (1966) ("the Compact"). WMATA's principal business activity is the planning, construction, and operation of the mass transit system (Metrobus and Metrorail) in the Washington, D. C. Metropolitan Area.

[2] *Qasim v. WMATA*, No. 6341-78 (D. C. Super. Ct. Nov. 5, 1981) (Murphy, J.); *Baker v. WMATA*, No. 3505-79 (D.C. Super. Ct. Nov. 25, 1981) (Murphy, J.); *Jones v. WMATA*, No. 12392-79 (D.C. Super. Ct. Nov. 30, 1981) (Murphy, J.); *Carter v. WMATA*, No. 8478-77 (D.C. Super. Ct. Dec. 4, 1981) (Murphy, J.); *Butterfield v. WMATA*, No. 16938-80 (D.C. Super. Ct. Dec. 10, 1981) (Murphy, J.); *Green v. WMATA*, No. 16861-80 (D.C. Super. Ct. Feb. 12, 1982) (Murphy, J.); *Artis v. WMATA*, No. 13485-79 (D.C. Super. Ct. Feb. 12, 1982) (Murphy, J.).

"[s]ince at least 1972, when then Superior Court Judge Penn decided *Quarles v. WMATA*, Civil Action No. 7286-73, it has generally been accepted that the Superior Court has concurrent jurisdiction with the District Court in this type of action. Many similar suits were brought in the Superior Court and proceeded to judgment." *Scott v. WMATA*, No. 82-0739 (D.D.C. June 15, 1982), *appeal docketed*, (D.C. Cir. Oct. 7, 1982), slip op. at 2-3. [3] The District of Columbia Court of Appeals has also consistently exercised jurisdiction over cases in which WMATA was the appellee, and on numerous occasions WMATA itself has invoked that court's jurisdiction through intervention or by seeking appellate review of Superior Court decisions.[4]

In its Opinion below, the Court of Appeals carefully considered and rejected the same challenges to its jurisdiction which WMATA now presents to this Court. With respect to WMATA's invocation of sovereign immunity and the Eleventh Amendment, the Court of Appeals properly concluded that Section 80 of the Compact waives immunity by establishing that WMATA shall be liable for torts "committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory." *Opinion*, 455 A.2d at 906, (Pet. App. B, 4a). The District of Columbia is a signatory to the Compact, and the Court of Appeals noted that D.C. Code Ann. § 11-921(a)(1981), App. A., 3a, provides plenary Superior Court jurisdiction over all civil actions brought in the District of Columbia.[5] The Court of Appeals then held that Section 81 of

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[3] Judge Gesell's opinion in *Scott v. WMATA* appears as Appendix B (App. 4a *et seq.* ) herein.

[4] *See, e.g., Potomac Electric Power Co. v. Public Service Commission*, Nos. 79-1159, 79-1106 (D.C. Ct. App. Feb. 16, 1983)(WMATA as intervenor); *WMATA v. L'Enfant Plaza Properties, Inc.*, 448 A.2d 864 (D.C. 1982); *WMATA v. Jones*, 443 A.2d 45 (D.C. 1981) (*en banc*); *Sledd v. WMATA*, 439 A.2d 464 (D.C. 1981); *WMATA v. Ward*, 433 A.2d 1072 (D.C. 1981); *White v. WMATA*, 432 A.2d 726 (D.C. 1981); *Cowden v. WMATA*, 423 A.2d 936 (D.C. 1980); *Queen v. D. C. Transit System, Inc.*, 364 A.2d 145 (D.C. 1976); *Fells v. WMATA*, 357 A.2d 395 (D.C. 1976).

[5] This jurisdictional grant to the Superior Court was provided by the Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970)("Court Reform Act"), which created the Superior Court. The avowed intent of the Act was to invest the Superior Court with jurisdiction "equivalent to that exercised by state courts." *Palmore v. United States*, 411 U.S. 389, 392 n.2 (1973).

the Compact, adopted prior to the creation of the Superior Court and granting the United States District Courts "original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority", did not bestow exclusive jurisdiction on the United States District Court for the District of Columbia over actions brought in the District of Columbia. *Opinion*, 455 A.2d at 907, (Pet. App. B, 6a-7a). The Court of Appeals held that no limiting language appeared in D.C. Code Ann. § 11-921(a) precluding Superior Court jurisdiction over tort claims against WMATA, and that accordingly no explicit statutory directive, unmistakable inference from legislative history, or clear incompatibility with federal interests prohibited concurrent Superior Court and District Court jurisdiction over questions of District of Columbia tort law involving WMATA. *Id.* WMATA seeks review of this unanimous *en banc* decision.

## REASONS FOR DENYING THE WRIT

This case presents no pressing federal question requiring resolution by this Court. WMATA purports to discern some grave importance in the question of whether a resident of the District of Columbia may sue WMATA on a common law claim in an Article I court (the Superior Court) as well as in an Article III court (the United States District Court). Petition at 8. WMATA's extended and at times excursive discourse on the Eleventh Amendment simply obscures the two salient points. In Section 80 of the Compact, WMATA waived immunity from tort claims arising from its proprietary functions, subjecting itself to suit in accordance with the law of the applicable signatory, which in this case is the District of Columbia. *See* App. A, 1a-2a. By the terms of Section 81 of the Compact, WMATA has always been subject to suit in the court of general jurisdiction for the District of Columbia, and at the time the Compact was adopted, the court of general jurisdiction in the District of Columbia, the United States District Court, was a court exercising judicial functions under both Article I and Article III of the Constitution. *Palmore v. United States, supra; National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). How the Eleventh Amendment is offended

when an agency which was amenable to suit in a court exercising both Article I and III powers is held to be amenable to suit in a court established under Article I is a question which WMATA's petition fails to answer.

Moreover, the impact of the Court of Appeals decision is confined to a relatively small number of cases. Although WMATA asserts that it will have to submit to "thousands of similar suits in the local courts of the District of Columbia", Petition at 8, WMATA simply ignores the fact that Section 81 of the Compact allows WMATA to remove any action to the United States District Court, which has original jurisdiction. *See* App. A at 2a; 28 U.S.C. §§ 1446, 1451. Accordingly, only those actions presently pending in the Superior Court are affected; from this day forward, if WMATA seriously believes it is prejudiced by an action proceeding in the Superior Court, it can simply remove that action to the United States District Court. Of course, the fact that WMATA chose not to remove these cases initially, nor the hundreds of other Superior Court actions that have proceeded to judgment over the last decade, speaks volumes about the "disadvantages" to Superior Court jurisdiction WMATA now professes.

Furthermore, WMATA's petition fails to point out that the reversal it seeks would frustrate the unmistakable intent of Congress underlying the Court Reform Act, deluge the United States District Court for the District of Columbia with common law tort cases raising no federal question whatever, and produce an absurd situation in choice of law cases where area courts must attempt to discern and apply the tort law made by the District of Columbia Court of Appeals to WMATA as that court would do, but with the Court of Appeals unable to render an opinion because WMATA is assertedly not subject to its jurisdiction. Accordingly, the petition for certiorari should be denied.

## I. The Court of Appeals Properly Rejected WMATA's Eleventh Amendment Argument.

The Eleventh Amendment bars federal court suits against an unconsenting State brought by the State's own citizens or those of another State. *Edelman v. Jordan,* 415 U.S. 651

(1974). While an interstate agency created by compact, such as WMATA, may be able to invoke the Eleventh Amendment, *see Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), in this case, any immunity WMATA might arguably have has been waived by WMATA's express consent to suit in federal court.[6] *See Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959).

Section 81 of the Compact unambiguously gives the United States District Courts original jurisdiction over all civil actions involving WMATA. App. A, 2a.[7] WMATA apparently contends, however, that it has consented to suit in all federal courts save one, the Superior Court of the District of Columbia, because that Court was created pursuant to Congress' Article I power.

As the Court of Appeals recognized, this argument cannot stand in light of the "unique bifurcated role" of the United States District Court for the District of Columbia in 1966 when the Compact was adopted. *Opinion*, 455 A.2d at 907, (Pet. App. B, 5a). At that time, the District Court was the District of Columbia's court of general jurisdiction, empowered to hear all "local" claims alleging more than $10,000 in damages, a function pursuant to Article I, as well as a court exercising Article III jurisdiction. *Palmore v. United States, supra*, 411

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[6] WMATA spends much of its petition in an argument designed to establish the proposition that it is an agency entitled to invoke the Eleventh Amendment. Petition at 11-19. As Judge Ferren's concurrence in the Opinion below indicates, the Court of Appeals did not decide this issue. Rather, the Court of Appeals assumed solely for the sake of argument that WMATA was an agency capable of invoking the Eleventh Amendment. *Opinion*, 455 A.2d at 907-08, (Pet. App. B, 7a-8a). Respondents submit that this analysis is appropriate, but in any event assert that WMATA may not invoke the Eleventh Amendment under this Court's test established in *Lake County Estates, supra*. The appropriate inquiry is whether the States intended WMATA to have the same immunity as the States themselves. In *Lake County Estates* the States filed briefs disclaiming any intent to confer immunity on the agency. 440 U.S. at 401. Similarly, in this case neither Maryland nor Virginia is before this Court to urge the sovereign immunity of WMATA.

[7] No limiting language appears in the Compact restricting federal court jurisdiction to certain districts. Indeed, counsel for WMATA acknowledged at oral argument before the Court of Appeals that all United States District Courts have subject-matter jurisdiction.

U.S. at 392 n.2. The Court of Appeals properly held that in Section 80 of the Compact WMATA consented to suit in each signatory's courts—i.e., for the District of Columbia, the general jurisdiction court—and that Section 81 of the Compact merely eliminated the $10,000 jurisdictional threshold for "local" actions in the United States District Court.[8] Thus, as the Court of Appeals held:

> The District Court for the District of Columbia did not need an independent grant of jurisdiction to empower it to hear WMATA actions. In its capacity as a court of general jurisdiction for the District of Columbia, it could already hear WMATA actions that met the $10,000 requirement.

*Opinion,* 455 A.2d at 907, (Pet. App. B, 5a).

Having plainly consented to suit in the federal courts and in the District of Columbia's general jurisdiction court in 1966, a court exercising Article I power, there is no basis for WMATA's present argument that it has not consented to suit in the Superior Court, the present Article I court for the District of Columbia exercising general jurisdiction.[9] Indeed, the arguments WMATA offers to the contrary, that the Eleventh

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[8] The Compact language allows suit in the courts of each signatory, but this plainly refers to courts which have jurisdiction over this type of action as determined by the signatory's jurisdictional statutes, i.e., the courts of general jurisdiction. WMATA seems to dispute this common sense proposition by claiming that the Compact authorizes suits against WMATA "in *all* the courts of Maryland and Virginia," thereby modifying jurisdictional rules in these States. Petition at 24. It is hard to believe WMATA intends this overreaching argument to be taken seriously; no one could rationally contend that a suit against WMATA for money damages could proceed initially in the Court of Appeals of Maryland or the Virginia Supreme Court, or in a special limited jurisdiction court, such as the Maryland Orphans' Court. *See* Md. Estates and Trusts Code Ann. § 2-101 *et seq.* (1981).

[9] Moreover, WMATA's own use of the Superior Court and the District of Columbia Court of Appeals for a variety of litigation over the last decade, including defense of claims, appellate review, intervention in pending cases, and the filing of civil complaints as plaintiff, *see generally* note 3 *supra* and accompanying text, constitutes a waiver of any Eleventh Amendment defense. *See, e.g., Vecchione v. Wohlgemuth,* 558 F.2d 150, 158 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977); *Gallagher v. Continental Insurance Co.,* 502 F.2d 827, 830 (10th Cir. 1974); *Dagnall v. Department of Highways, State of Louisiana,* 466 F. Supp. 245, 246 (E.D. La. 1979).

Amendment would be compromised by suits in the Superior Court because that Article I court assertedly lacks "the constitutionally recognized guarantees of judicial impartiality" and is subject to congressional control, Petition at 20-23, have already been rejected by this Court in similar cases involving the District of Columbia court system.

In *Palmore v. United States, supra,* on review of a criminal conviction in the Superior Court of the District of Columbia, this Court held that the Constitution did not require all federal questions or all federal criminal prosecutions to be tried in an Article III court. 411 U.S. at 407. The Court concluded that a criminal defendant tried before a Superior Court judge was no more disadvantaged than any other defendant tried in a State court where the judge similarly lacked life tenure. *Id.* at 410. By parity of reasoning, no cognizable Eleventh Amendment interest of WMATA is offended by the Court of Appeals' decision. WMATA has consented to suit in the federal district courts, and the fact that it is also amenable to suit in the Superior Court, where the judges lack life tenure, surely poses no "disadvantage" not already present from the fact that WMATA has consented to suit in Maryland and Virginia, where the judges also lack the "protections" afforded by Article III.

Similarly, in *Swain v. Pressly,* 430 U.S. 372 (1977), this Court held that even though Superior Court judges did not enjoy the life tenure and salary protections afforded by Article III, collateral review of criminal convictions in the Superior Court did not offend the Suspension Clause. The Court held that *Palmore* "necessarily determines that the judges of the Superior Court of the District of Columbia must be presumed competent to decide all issues, including constitutional issues." *Id.* at 383. The Opinion below does no more than effectuate this language, holding in effect that Superior Court judges are competent to decide questions of local tort law when WMATA is a party.

In sum, no substantial question of Eleventh Amendment jurisprudence is presented in this case. The judicial power of the United States has already been properly extended to WMATA

by virtue of WMATA's consent in Section 81 of the Compact to suit in the United States District Courts. Since judges of the two State signators may also decide WMATA cases, and WMATA is not disadvantaged by the absence of Article III judges in these systems, no conceivable disadvantage suddenly springs into being from the absence of Article III judges in the Superior Court.[10] Accordingly, WMATA's Eleventh Amendment arguments were properly rejected by the Court of Appeals, and provide no basis for granting the petition.

## II The Court of Appeals Properly Held that Section 81 of the Compact is Not A Grant of Exclusive Jurisdiction.

The Court of Appeals correctly held that the mere fact that Section 81 of the Compact did not mention the Court of General Sessions, a limited jurisdiction court existing at the time the Compact was adopted, could not transform the grant of original jurisdiction to the District Court into a grant of exclusive jurisdiction. *Opinion*, 455 A.2d at 907, (Pet. App. B, 5a-7a). The Court of Appeals properly looked to the grant of general jurisdiction contained in D.C. Code Ann. § 11-921(a), and upheld jurisdiction in both the Superior Court and the District Court in furtherance of this Court's presumption in favor of concurrent, rather than exclusive, federal jurisdiction. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

WMATA's petition presents no sound reason for reversal of the Court of Appeals' decision. The Court of Appeals found that there was no "explicit statutory directive", *Gulf Offshore Co., supra*, 453 U.S. at 478, precluding Superior Court jurisdiction over WMATA in the language of D.C. Code Ann. § 11-921(a). *Opinion*, 455 A.2d at 907, (Pet. App. B, 6a). Indeed, in Section 11-921(a) Congress provided that "the Superior

[10] *Cf. Nevada v. Hall*, 440 U.S. 410 (1979) (Sovereign immunity which a State may have in its own courts has no impact in the courts of another State). Although WMATA claims the Court of Appeals misapplied *Nevada v. Hall* because the District of Columbia is not a State, Petition at 19-20, this argument overlooks the fact that the Court of Appeals was construing the Compact's immunity provisions, and Section 1 of the Compact establishes that for purposes of interpreting the Compact the District of Columbia is treated as a "State". *See* App. A, 1a.

Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia." App. A, 3a.[11] Similarly, the Court of Appeals found no inference from the legislative history of the Court Reform Act to indicate that Congress did not intend the Superior Court to exercise jurisdiction over WMATA. *Opinion*, 455 A.2d at 907, (Pet. App. B, 6a).[12] To the contrary, this Court has already ruled that the intent to the Act was to invest "the local courts with jurisdiction equivalent to that exercised by state courts", reaching "all civil actions". *Palmore v. United States, supra*, 411 U.S. at 392 n.2. Finally, the Court of Appeals held that the fact that Maryland and Virginia courts exercise jurisdiction over WMATA and the fact that Congress had not acted to prevent the Superior Court from exercising jurisdiction over WMATA in the ten years that court had done so, *see* note 3 *supra*, demonstrated that there was "no clear incompatibility between Superior Court jurisdiction and federal interests." *Opinion*, 455 A.2d at 907, (Pet. App. B, 7a). Thus, the Court of Appeals' decision squarely accords with this Court's analytical model for assessing whether jurisdiction is concurrent or exclusive, and review is not warranted.

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[11] WMATA's petition asserts that D.C. Code Ann. § 11-924 (1981), which gives the Superior Court jurisdiction over violations of rules adopted under the Compact, indicates that Congress excluded civil jurisdiction over WMATA. Petition at 26. However, Section 11-924, adopted after the Court Reform Act, *see* Pub. L. No. 94-306, 90 Stat. 672 (1976), was enacted to fill a gap in the Superior Court's criminal jurisdiction, D. C. Code Ann. §11-923 (1981), which denied jurisdiction over regulations not applicable exclusively to the District of Columbia. *Hubbell v. United States*, 289 A.2d 879 (D.C. 1972). Compact rules, applicable to jurisdictions other than the District of Columbia , would have been outside the scope of Section 11-923 but for the existence of Section 11-924. Since Section 11-921, the civil jurisdictional grant with which this case is concerned, was far broader than the criminal jurisdictional grant, there was no need for a clarifying section.

[12] WMATA asserts that the absence of a conforming amendment to the WMATA Compact transferring jurisdiction from the District Court to the Superior Court somehow establishes that Congress did not intend the Superior Court to have jurisdiction over these local tort actions. Petition at 26. However, the absence of a conforming amendment is hardly surprising, since technically no transfer of jurisdiction was made. The District Court simply retained its original jurisdiction, and the retention of original jurisdiction surely did not preclude Congress from creating concurrent jurisdiction in the Superior Court, which it did through the broad grant of Section 11-921(a).

## III. The Court of Appeals' Decision Comports With The Legislative Intent of the Court Reform Act, Aids in the Administration of Justice in the District of Columbia, and Prevents Judicial Disarray in Choice of Law Cases.

WMATA's petition obscures the fact that all of the cases involved in this proceeding are common-law tort actions against a common carrier, raising no federal question whatever on the merits.[13] In holding that these cases, all of which arise under District of Columbia law, may proceed in the Superior Court, the Court of Appeals furthered the legislative intent underlying the Court Reform Act, aided the administration of justice by providing a forum other than the United States District Court for the adjudication of these non-federal matters, and prevented the judicial disarray that would result in choice of law cases if the Court of Appeals could not decide these cases.

### A. The Policy of the Court Reform Act

The Court of Appeals was unquestionably correct in holding that "the explicit purpose of the Court Reform Act of 1970 was to create one Superior Court with jurisdiction equivalent to that of a state court." *Opinion,* 455 A.2d at 907, (Pet. App. B, 7a). *See* H.R. Rep. No. 907, 91st Cong., 2d Sess. (1970) at 23 (goal of legislation to create "one trial court of general local jurisdiction, the Superior Court of the District of Columbia"). As this Court recognized in *Palmore:*

> The other part of the remedy [for the crisis in the judicial system of the District of Columbia] was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controverses that arise under local law . . . having little, if any, impact beyond the local jurisdiction.

411 U.S. at 409.

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[13] This Court has consistently adhered to the principle that decisions on issues of localized character by the courts of the District of Columbia do not merit review. *Pernell v. Southall Realty,* 416 U.S. 363, 366 (1974); *General Motors Corp. v. District of Columbia,* 380 U.S. 553, 556 (1965).

By seeking review of the Court of Appeals' decision, WMATA necessarily argues that suits against it in the District of Columbia may only be filed in the United States District Court, even though the same or a similar action may proceed in local Maryland and Virginia courts of general jurisdiction. Although the Act plainly was intended to give the Superior Court jurisdiction equivalent to that exercised by state courts, *id.* at 392 n.2, the local court system of the District of Columbia is in no sense equivalent to state court systems if it cannot even apply local tort law to actions involving the area's largest common carrier. The Court of Appeals' decision simply prevents WMATA from transforming the Superior Court into a local limited jurisdiction court of the sort that existed prior to the Court Reform Act.

**B. Administration of Justice in the District of Columbia**

This Court has also recognized that a fundamental purpose of the Court Reform Act was to:

> [R]elieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress.

*Palmore, supra,* 411 U.S. at 408-09.

Obviously, there is nothing genuinely federal about the personal injury litigation WMATA seeks to confine to the United States District Court. A tort action brought by a District resident against a District agency for an injury sustained in the District which will be decided on the basis of local District of Columbia law logically should proceed in the Superior Court, the District's local court of general jurisdiction. By reaching the result it did, the Court of Appeals confirmed this eminently reasonable proposition. WMATA's petition for review, on the

other hand, proceeds on the assumption that every "fender-bender" involving a WMATA vehicle must be tried in the United States District Court. A more complete perversion of what Congress sought to accomplish with the Court Reform Act can hardly be imagined.

**C. Choice of Law Cases**

The Opinion below also prevents the judicial disarray that would result if the Court of Appeals were denied jurisdiction over WMATA actions while the Maryland and Virginia state courts and the United States District Courts retained jurisdiction. In each of the cases considered by the Court of Appeals the injury occurred in the District of Columbia. Accordingly, Maryland and Virginia state courts would, under their choice of law rules, apply District of Columbia tort law, as would the United States District Courts. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).[14] Similarly, the United States District Court for the District of Columbia must apply local tort law as determined by the Superior Court and the District of Columbia Court of Appeals. *Higgins v. WMATA*, 507 F. Supp. 984 (D.D.C. 1981); *In re Air Crash Disaster*, 476 F. Supp. 521, 526 n.11 (D.D.C. 1979).

Accordingly, in cases where the injury occurred in the District of Columbia, every court in the area would attempt to apply the law it believes the District of Columbia Court of Appeals would apply; except that, under WMATA's interpretation of the Compact, the District of Columbia Court of Appeals could never apply any law to WMATA, because WMATA is assertedly never subject to that court's jurisdiction. It is difficult to imagine a more ludicrous situation than two state court systems and the federal courts attempting to discern, apply, and decide questions of District of Columbia tort law with the court that is responsible for making that law unable to render an opinion in the field. The Court of Appeals' decision prevented this unseemly result, and this Court should do likewise by denying the writ.

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[14] Maryland and Virginia courts both apply the substantive law of the place of the wrong in choice of law cases. *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975); *McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1978).

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

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## CERTIFICATE OF SERVICE

In accordance with Rules 22.1 and 28.3 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing "Brief for Respondent in Opposition to the Petition for Writ of Certiorari to the District of Columbia Court of Appeals" were mailed by first-class United States mail, postage prepaid, to the following counsel of record for the Petitioner on this 15th day of April, 1983:

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Albert H. Turkus

## APPENDIX A

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, § 8, cl. 9:

> The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court;

United States Constitution, Article I, § 8, cl. 17 (in part):

> The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . .

United States Constitution, Article III, § 1:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

United States Constitution, Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

WMATA Interstate Compact, Section 1 (in part):

Definitions

. . .

(d) "Signatory" means the State of Maryland, the Commonwealth of Virginia and the District of Columbia;

(e) "State" includes District of Columbia;

. . .

WMATA Interstate Compact, Section 12 (in part):

Enumeration

12. In addition to the powers and duties elsewhere described in this Title, the Authority may:

(a) Sue and be sued;

. . .

WMATA Interstate Compact, Section 80:

Liability for contracts and torts

80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

WMATA Interstate Compact, Section 81:

Jurisdiction of Courts

81. The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority, and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

WMATA Interstate Compact, Section 85 (in part):

Construction and severability

85. . . It is the legislative intent that the provisions of this Title be reasonably and liberally construed.

District of Columbia Code, Title 11, Chapter 7 (1981)(in part):

§ 11-721. Orders and Judgments of the Superior Court.

(a) The District of Columbia Court of Appeals has jurisdiction of appeals from—

(1) all final orders and judgments of the Superior Court of the District of Columbia;

. . .

District of Columbia Code, Title 11, Chapter 9 (1981) (in part):

§ 11-921. Civil jurisdiction

(a) Except as provided in subsection (b), the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia . . .

. . .

§ 11-923. Criminal jurisdiction; commitment.

. . .

(b)(1) Except as provided in paragraph (2), the Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia.

. . .

§ 11-924. Jurisdiction with respect to violations of the Rules and Regulations of the Washington Metropolitan Area Transit Authority

The Superior Court has jurisdiction with respect to any violation, committed in the District of Columbia, of the rules and regulations adopted by the Washington Metropolitan Area Transit Authority under Section 76(e) of Title III of the Washington Metropolitan Area Transit Regulation Compact.

## APPENDIX B

IN THE

## UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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**Civil Action No. 82-0739**

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CHARLES O. SCOTT,
*Plaintiff,*

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
*Defendant/Cross-Defendant;*

JOSEPH N. WILKINSON and
YVONNE B. CRAFT,
*Defendants/Cross-Plaintiff.*

### MEMORANDUM

Defendant Washington Metropolitan Area Transit Authority ("WMATA") has moved to dismiss as time-barred plaintiff's action to recover for injuries allegedly suffered while a passenger on a bus operated by WMATA. Plaintiff acknowledges this action was commenced after the three-year statute of limitations had expired, see D. C. Code § 12-301(8) (1981 ed.), but nevertheless opposes the motion on the ground that the time for filing the action should be deemed tolled given the special circumstances recited below.

Plaintiff was allegedly injured on July 21, 1977, and filed suit in the Superior Court of the District of Columbia on September 5, 1979, well within the statute of limitations. On February 23, 1982, two days prior to the scheduled commencement of trial in Superior Court, but after the statute had

run, WMATA filed a motion to dismiss on the ground that the Court lacked jurisdiction over the action under the terms of the Washington Metropolitan Area Transit Authority Compact, D.C. Code § 1-2431 ¶81 (1981 ed.). The Superior Court has declined to rule on the motion, apparently pending resolution by the District of Columbia Court of Appeals of the question of the Superior Court's jurisdiction in suits brought against WMATA which had unexpectedly arisen in other but similar litigation. On March 15, 1982, approximately three weeks after the motion to dismiss was filed in Superior Court, plaintiff commenced this action in the Distrit Court. Because this action was filed in this Court over four years after the incident giving rise to plaintiff's injuries it is barred by the statute of limitations unless the statute was tolled by the pendency of the Superior Court action.

Filing suit in a court that lacks jurisdiction will not generally toll the statute of limitations. In the Supreme Court's traditional formulation:

> If a plaintiff mistakes his remedy, in the absence of any statutory provisions saving his rights, or where from any cause . . . the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. *Willard v. Wood,* 164 U.S. 502, 523 (1896).

*See also Dupree v. Jefferson,* 666 F.2d 606, 610 (D.C. Cir. 1981). But if the prior action was sufficient to place the defendant on notice of plaintiff's claim—thus fulfilling the purpose of the statute of limitations, the limitations period may be tolled in the interests of fairness in some circumstances. *See American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974); *Burnett v. New York Central R. Co.,* 380 U.S. 424 (1965). In particular, filing suit in the wrong court in the mistaken, but reasonable belief that that court has jurisdiction has been recognized as an equitable factor that may toll the statute of limitations. *See Fox v. Eaton Corp.,* 615 F.2d 716, 719 (6th Cir. 1980).

The equities of this particular action militate strongly against strict application of the limitations period. Since at least

1973, when then Superior Court Judge Penn decided *Quarles v. WMATA,* Civil Action No. 7286-73, it has generally been accepted that the Superior Court has concurrent jurisdiction with the District Court in this type of action. Many similar suits were brought in the Superior Court and proceeded to judgment. Whether WMATA has a legal right to dismissal of the Superior Court action is a question the Court need not decide; at a minimum, however, plaintiff's assumption that the Superior Court had jurisdiction was entirely reasonable. Plaintiff very promptly initiated suit in this Court after the motin to dismiss was filed in the Superior Court. Under all the circumstances, the Court finds that the statute of limitations was tolled by the pendency of the Superior Court action and the motion to dismiss must therefore be denied.

An appropriate order is filed herewith.

/s/ GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

June 14, 1982.
[Filed 6-15-82]

No. 82-1540

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
*Petitioners,*

v.

ROBERTO QASIM, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

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## PETITIONERS' REPLY MEMORANDUM

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
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v.

ROBERTO QASIM, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

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## PETITIONERS' REPLY MEMORANDUM

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Respondents Roberto Qasim, *et al.*, argue that the court below correctly interpreted the Eleventh Amendment and the WMATA Interstate Compact, and that its decision does not warrant review by this Court.

Both State signatories to the WMATA Interstate Compact disagree. *See* Md.-Va. *Amici* Br. 1-9, 11.

Because respondents' brief largely repeats the view of the District of Columbia Court of Appeals, which we have already addressed in our petition, we limit our reply

brief to the following points to correct some mistaken or misleading assertions of law and fact made by respondents.

But before doing so, we believe it important to note at the outset that there can no longer be any question that WMATA is an interstate agency and, as such, is fully entitled to invoke the same Eleventh Amendment immunity that the States of Maryland and Virginia could assert.[1] Both of the standard guides for construing an interstate compact—the plain language of its text and the construction given the compact by its signatories—compel the conclusion that WMATA may invoke the Eleventh Amendment. Pet. 15-17; Md.-Va. *Amici* Br. 7-8.[2] Maryland and Virginia have clearly stated that "[they] agree with Petitioners that WMATA is an arm of the signatory States, and is entitled to invoke the same Eleventh Amendment immunity that Maryland and Virginia could." Md.-Va. *Amici* Br. 8. Accordingly, the only remaining question is whether WMATA is somehow barred from invoking the immunity to which it may otherwise lay claim. None of the reasons given by respondents for such a conclusion can pass muster.

1. Respondents argue (Opp. 6-9 & n.9) that (a) because the United States District Court for the District of Columbia in 1966 was an Article III and Article I court, Section 81 of the WMATA Compact waives WMATA's Eleventh Amendment immunity in the local courts of the District; (b) this Court's decisions in *Pal-*

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[1] In addition to the cases cited in the Petition (pp. 11-14 & nn.7 & 9), the United States Court of Appeals for the District of Columbia Circuit, in a case involving WMATA, has indicated its approval. *Morris* v. *WMATA*, No. 81-1209 (Mar. 8, 1983), slip op. at 6-7.

[2] This is true even under the test offered by respondents: "The appropriate inquiry is whether the States intended WMATA to have the same immunity as the States themselves." Opp. 6 n.6. Maryland and Virginia have definitively answered that question in the affirmative. Md.-Va. *Amici* Br. 8.

*more* v. *United States*, 411 U.S. 389 (1973), and *Swain* v. *Pressley*, 430 U.S. 372 (1977), undermine WMATA's Eleventh Amendment argument; and (c) WMATA has waived its immunity by litigating *other* cases in the local courts. All three arguments are simply wrong as a matter of law, and the last misstates the record as well.

a. Respondents' premise for their first argument—that the United States District Court for the District of Columbia was, in 1966, an Article I court—is wrong as a matter of law. Respondents have confused two very different issues by intermixing (i) the question of whether a particular court is an Article III or Article I court with (ii) the question of whether an Article III court may constitutionally be given Article I jurisdiction. In *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), this Court stated that the predecessors to the current Article III courts in the District of Columbia were also Article III courts—that is, the judges of these courts were entitled to life tenure during good behavior, as well as a nondiminishable salary—notwithstanding their authority to exercise Article I as well as Article III power.[3] But *O'Donoghue* did *not* rule that these courts were Article I courts because of their Article I authority. At best, *O'Donoghue* noted in dictum that these were hybrid Article III courts because of their combined Article III and Article I powers. Therefore, because the United States District Court for the District of Columbia in 1966 was an Article III court (as *O'Donoghue* specifically held), and even assuming that *O'Donoghue's* dictum is still valid

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[3] Respondents incorrectly cite *Palmore* v. *United States*, *supra*, and *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), for this proposition. Neither case so holds. *Palmore* upheld the constitutionality of Congress' creation of *purely* Article I courts rather than Article III or hybrid courts for the District of Columbia. And six Justices in *Tidewater Transfer Co.* wrote that Congress could *not* give an Article III court Article I jurisdiction. 337 U.S. at 607-617, 627-645, 646-655.

—a proposition itself open to doubt[4]—*O'Donoghue* does not answer the question posed here: whether a State may be sued in an Article I court consistently with the Eleventh Amendment.

Neither *O'Donoghue* nor any later decision of this Court ever upheld the exercise of Article I jurisdiction by such a hybrid court over a State's claim that the Eleventh Amendment forbade that result. Respondents' argument that by submitting themselves to suit in the then-existing Article III courts in the District of Columbia, the States also submitted themselves to suit in the as-yet-uncreated Article I courts for the District is unsupported by *O'Donoghue* or any other decision of this Court. Moreover, Maryland and Virginia have disavowed any such interpretation of Section 81. Md.-Va. *Amici* Br. 6-7. Therefore, respondents' argument is without support.[5]

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[4] This ruling in *O'Donoghue* was a clear departure from prior law that had assumed that Articles I and III were mutually exclusive sources of federal judicial authority (*e.g.*, *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828); Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894 (1930)), and that the federal courts in the District were Article I courts only. *E.g.*, *Federal Radio Comm'n* v. *General Electric Co.*, 281 U.S. 464 (1930); *Ex parte Bakelite Corp.*, 279 U.S. 438, 460 (1929). Moreover, both *Tidewater Transfer Co.* and *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), cut away the *O'Donoghue* dictum's sustaining logic. *See* note 3 *supra*. Accordingly, it is not altogether clear that the *O'Donoghue* dictum, on which respondents' argument must necessarily rest, is still valid today. In fact, this Court has never upheld the exercise of Article I authority by any such hybrid court.

[5] Respondents have devoted only a footnote (Opp. 9 n.10) to their attempt to rehabilitate the lower court's erroneous interpretation of *Nevada* v. *Hall*, 440 U.S. 410 (1979). In so doing, respondents do not attempt to suggest that *Hall* itself is applicable, but argue instead that Section 1 of the WMATA Interstate Compact treats the District of Columbia as a State, thereby incorporating *Hall* by reference. First, the Compact was drafted 13 years prior to *Hall*, and therefore it is clear that the States could not have adopted Section 1 with *Hall* in mind. Second, any attempt to rely upon Section 1 of the Compact as authorizing suit in the local District courts

b. Furthermore, neither *Palmore* nor *Swain*, upon which respondents heavily rely (Opp. 6-9), is at all dispositive of the Eleventh Amendment issues posed by this case. *Palmore* held only that Article III did not, *ex proprio vigore*, require Congress to vest the local courts of the District with Article III attributes (411 U.S. at 399-400), and *Swain* added only the proposition that the Suspension Clause (Art. I, § 9, cl. 2) did not independently forbid what *Palmore* had ruled Article III permitted. 430 U.S. at 379-384. Neither decision even adverted to the Eleventh Amendment, which is an explicit limitation upon the "Judicial power of the United States," regardless of its proper source (*Palmore*), which is entirely separate from the Suspension Clause (*Swain*), and which reflects concern for intergovernmental immunity rather than unitary legislative authority (*Palmore*; *Swain*).

Indeed, *Palmore* and *Swain* reinforce WMATA's argument that the Eleventh Amendment is fully applicable in Article I courts. *Swain* acknowledged that Congress' Article I power to define the jurisdiction of the local courts of the District—a matter already approved in *Palmore*—was nevertheless subject to constitutional limitations independent of Article III, of which the Eleventh Amendment is the most direct and explicit example. Because this Court had already ruled prior to *Swain* that Congress' exercise of its Article I power to charter a federal corporation does not *eo ipso* nullify a State's Eleventh Amendment immunity (*Smith* v. *Reeves*, 178 U.S. 436 (1900)), *Swain* supports WMATA's argument that the Eleventh Amendment independently limits that selfsame

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must run aground on the specific provision in the Compact performing that very chore—Section 81—which makes no mention of suits against WMATA in the local courts. Finally, and most importantly, Maryland and Virginia agree with petitioners that nothing in the Compact supports respondents' view of Section 1. "[B]oth States interpret the Compact to deny the local District of Columbia courts jurisdiction over WMATA." Md.-Va. *Amici* Br. 8.

Article I authority to create the local courts for the District.

c. Respondents' third argument—that WMATA itself has waived its immunity by litigating *other* cases in the local courts of the District—is nothing if not original. It is well established that a State may assert the Eleventh Amendment as a bar to federal jurisdiction at any time without forfeiting the claim, and may even raise that claim for the first time in this Court.[6] Therefore, even if WMATA had not raised the Eleventh Amendment beforehand in this case—as it most assuredly did (*e.g.*, Pet. App. 4a) and as respondents do not deny—WMATA could raise that claim now.

Respondents have also misstated the record. As their own Opposition Brief points out (p. 3), WMATA challenged the jurisdiction of the Superior Court over WMATA as early as 1972—the year in which the Court Reform Act went into effect—in *Quarles* v. *Metrobus-WMATA*, CA No. 7286-73 (D.C. Super. Ct.). Moreover, WMATA has pressed this issue before *all* other Superior Court judges, and all of these judges save one have ruled in WMATA's favor, dismissing the complaint for lack of subject matter jurisdiction.[7]

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[6] *E.g.*, *Patsy* v. *Board of Regents*, 102 S. Ct. 2557, 2568 n.19 (1982); *Alabama* v. *Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam); *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467 (1945).

In fact, this Court has even raised the Eleventh Amendment itself when it appeared potentially applicable, notwithstanding a State's decision to abandon the defense earlier in the same case. *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975).

[7] *E.g.*, *Lewis* v. *WMATA*, CA No. 10636-80 (D.C. Super. Ct. 1981) (Judge Sylvia Bacon); *Robinson* v. *WMATA*, CA No. 6610-80 (D.C. Super. Ct. 1982) (Judge Carlisle Pratt); *Johnson* v. *Wells*, CA No. 14720-80 (D.C. Super. Ct. 1982) (Judge John F. Doyle); *Lagroom* v. *WMATA*, CA No. 14272-79 (D.C. Super. Ct. 1982) (Judge Nicholas S. Nunzio). *Contra Butler* v. *WMATA*, CA No. 1486-81 (D.C. Super. Ct. 1982) (Judge Frank E. Schwelb). Re-

2. Respondents' argument (Opp. 4, 11) that WMATA's consent to be sued for its proprietary torts renders irrelevant the question of whether one court or another is the appropriate forum for suit manifests respondents' faulty grasp of Eleventh Amendment principles. This Court has consistently recognized that a State's waiver of immunity for a particular claim in one court has no effect at all on the State's right to assert its immunity in another court. *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 574 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. at 465.

3. Respondents' argument (Opp. 9-10) that the court below correctly interpreted Section 81 of the WMATA Interstate Compact simply repeats the conclusion of the court below, which we have already shown to be in error. Pet. 24-28. The central flaw with that argument (as with the construction given Section 81 by the court below) is that it *reverses* the appropriate method of statutory construction. Rather than construe the terms of Section 81 and determine whether the Court Reform Act did or could modify Section 81's terms, respondents skip over Section 81 and look entirely to the terms of the 1970 Court Reform Act. As we have already shown—and both Maryland and Virginia agree (Md.-Va. *Amici* Br. 8-9)—the decision below is at odds with the plain language of Section 81 and the construction given that Section by its signatories, with nothing in the text or legislative history of the Court Reform Act to the contrary.

4. Respondents also offer a potpourri of reasons why the decision below makes good sense, even if incorrect. Opp. 5, 11-13. These reasons not only fail to find a source in the WMATA Interstate Compact but effectively demonstrate that the Article I District of Columbia Court of Appeals legislatively and unilaterally amended the terms

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spondents' intimation (Opp. 2 & n.2) that only one Superior Court judge has ruled in WMATA's favor is simply wrong.

of the Compact, without obtaining the consent of the state signatories thereto.

a. Respondents' argument (Opp. 5) that the decision below affects only a small number of cases because WMATA can remove all future suits to the Article III courts of the District is wrong on two counts. It is black-letter law that a defendant cannot remove a suit from the court of its original filing to a federal court if the original court did not have subject matter jurisdiction over the suit. *Freeman* v. *Bee Mach. Co.*, 319 U.S. 448 (1943); *Lambert Run Coal Co.* v. *Baltimore & O. R.R. Co.*, 258 U.S. 377, 382 (1922); 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3721, at 521-523 (1976). Respondents' contention that WMATA could remove future suits simply points out the fact that the issue of the Superior Court's jurisdiction to entertain suits against WMATA will certainly arise in the Article III courts of the District, and, therefore, review is plainly warranted at this time. Admixed to that consideration is the fact that WMATA is an interstate agency and will, like any government agency, be subject to tort suits on a recurring basis. Maryland and Virginia have already expressed this concern, pointing out that this Court ought therefore to settle the issues in this case now rather than later. Md.-Va. *Amici* Br. 10 & n.7.

b. Respondents' argument (Opp. 11-13) that the decision below is in conformance with the purpose of the Court Reform Act and prevents disruption of the administration of justice in the District wrongly assumes, without any support in the text or legislative history of that Act, that suits against an interstate agency are "'purely local matters'" (*Swain*, 430 U.S. at 375, quoting S. Rep. No. 405, 91st Cong., 1st Sess., p. 5 (1969)) with which that Act was concerned. Moreover, both Maryland and Virginia strongly disagree with any such conclusion. Md.-Va. *Amici* Br. 8-9. Respondents' argument also overlooks the fact that Section 81 of the Compact

*already authorizes any plaintiff to sue WMATA in the United States District Court for the District of Columbia.* In other words, Congress has decided that the District's Article III courts *are* an appropriate forum for suits against WMATA. Reversal is therefore hardly contrary to the expressed intent of Congress.

c. Finally, respondents argue (Opp. 13) that reversal will wreak havoc upon choice of law matters in suits against WMATA. Choice of law has nothing to do with the issue of whether a court has jurisdiction to make the choice. Section 81 does not eliminate *all* tort actions of *any* type from the Superior Court's jurisdiction, only those tort suits involving WMATA. Hence, just as the Article III courts throughout the Nation apply state tort law in Federal Tort Claims Act or diversity cases without wreaking havoc on state court systems, so too the Article III courts in the District of Columbia will apply the tort law developed by the local District courts in cases not involving WMATA. Respondents' rather overblown (and manifestly irrelevant) argument hardly justifies the decision below.

5. Finally, the issues posed by this case are not simply matters of local law that should be left to the District of Columbia courts to decide, as respondents suggest. Opp. 11 n.13. The substantial questions raised by this case cannot be shrugged off as matters of only local interest. That is so for four reasons.

*First*, the relationship between Article I and Article III courts and the Eleventh Amendment is not simply a matter of local substantive tort law which the courts of the District should be free to decide. It goes to the very core of the structure of our federal judicial system.

*Second*, the interstate compact issues *by definition* are also not simply matters of interest only to the District. These issues are of great importance to Maryland and Virginia and to other States as well.

*Third*, both of the above issues involve the *jurisdiction* of the local District of Columbia court system, rather than a matter of substantive law, and are therefore clearly of the type that this Court has always considered appropriate for its review. Pet. 10-11 & n.4, and cases there cited. Surely the question of whether a State may be sued in an Article I court notwithstanding the Eleventh Amendment is as important an issue as whether the District of Columbia Court of Appeals may regulate the local bar. *See District of Columbia Court of Appeals* v. *Feldman*, 51 U.S.L.W. 4285 (U.S. Mar. 23, 1983).

*Fourth*, the substantial objections that the State of Maryland and the Commonwealth of Virginia have raised to the judgment below should demonstrate that the Eleventh Amendment and interstate compact questions transcend any peculiarly local flavor that this case might otherwise have. These issues are of serious concern to both States, as evidenced by their participation as *amici* in support of petitioners. We submit that the concern expressed by these States—which have agreed with petitioners on *every* issue presented in the petition—is entitled to great respect by this Court, and strongly counsels in favor of review. Indeed, this is now the *only* court in which Maryland and Virginia can hope to correct the errors of the court below. This Court should do so by granting the petition and reversing the judgment of the court below.

## CONCLUSION

We submit that the reasons given in the petition and in the *amici* brief filed by Maryland and Virginia demonstrate that the court below has decided several novel issues involving the Eleventh Amendment and the WMATA Interstate Compact in a manner contrary to settled Eleventh Amendment principles and at odds with the text of the WMATA Compact and with the signatories' construction thereof. This case clearly merits this Court's review. The Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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No. 82-1540

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
*Petitioners,*

v.

ROBERT QASIM, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

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## BRIEF *AMICI CURIAE* OF THE STATE OF MARYLAND AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

We hereby adopt the QUESTIONS PRESENTED contained in the Petition. Pet. (i).

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## BRIEF *AMICI CURIAE* OF THE STATE OF MARYLAND AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

### INTEREST OF *AMICI*

The State of Maryland and the Commonwealth of Virginia are signatories to the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966) ("the Compact" or "the WMATA Interstate Compact"). As signatories, the States have a surpassing interest in ensuring that the terms of the Compact are observed according to its plain language and the interpretation given that language by the signatories. This is particularly true with regard to the provisions authorizing suit against WMATA, because Maryland and Virginia contribute funds from their state treasuries to WMATA for its operating budget, and it is from that budget that WMATA pays the damage awards imposed upon it. The decision below is contrary to both the plain

meaning of Section 81 of the Compact and our interpretation of that provision.

Moreover, the implications of the decision below extend beyond the confines of these seven cases. By refusing to honor the plain meaning of the Compact's terms, the lower court threatens to upset established principles for interpreting interstate compacts. Maryland and Virginia are parties to several such compacts (*see* The Council of State Governments, *Interstate Compacts and Agencies*, pp. 38 (Maryland), 43 (Virginia) (1979 ed.)), which have been faithfully entered into based upon the plain meaning of their terms, as understood by their signatories. Because the court below interpreted one such compact by relying upon language nowhere found in the agreement and upon subsequent congressional legislation having nothing to do with the WMATA Interstate Compact, its decision puts at risk the approach which we, and other States as well, have always followed in construing these agreements.

Furthermore, the District of Columbia Court of Appeals, a federal court created by Congress under Article I of the Constitution, concluded that the Eleventh Amendment does not bar the local District of Columbia courts from exercising jurisdiction over WMATA. In fact, that court added that "Maryland and Virginia do not have sovereign immunity from suits brought in the District of Columbia courts." Pet. App. 4a. This conclusion is at odds with the text of the Eleventh Amendment, its history, and its underlying principles. None of these distinguish between the "Judicial power" granted Article I and Article III courts. Moreover, this Court's decisions have consistently respected that history and those principles, and do not support the conclusion of the court below. Accordingly, we believe that the Eleventh Amendment bars suit against WMATA, Maryland, and Virginia in the District of Columbia, and that the lower court erred by holding to the contrary.

## REASONS FOR GRANTING THE PETITION

### A. The Court Below Misinterpreted the Eleventh Amendment and Section 81 of the WMATA Interstate Compact.

The court below held that WMATA may be sued in the local courts of the District of Columbia. Unless this decision is reversed, WMATA will be subject to suit in the local courts of the District, contrary to both the applicable Eleventh Amendment principles and Section 81 of the Compact.

1. The Eleventh Amendment to the Constitution of the United States expressly limits "[t]he Judicial power of the United States * * *" by granting the States immunity from suit in federal court. The familiar history of the Eleventh Amendment makes it clear that the Amendment was meant as something more than an empty gesture to the States. This Court long ago observed that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people." *Hans* v. *Louisiana*, 134 U.S. 1, 12 (1890). After *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), erroneously rejected that consensus view of the Founding Fathers, the States enacted the Eleventh Amendment to embody the proposition that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934), quoting *The Federalist*, No. 81, at 487 (A. Hamilton).

Because of the importance of the Eleventh Amendment to our federal system, this Court has not been chary with its interpretation of the Amendment's reach. In each case, whether the question has been to determine what parties are barred by the Eleventh Amendment from su-

ing,[1] what parties are entitled to rely upon the immunity granted by the Eleventh Amendment,[2] or what claims are barred under the Eleventh Amendment,[3] this Court has recognized that, because "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" (*Ex parte Ayers*, 123 U.S. 443, 505 (1887)), the immunity granted by the Amendment must be given an interpretation commensurate "with such breadth and largeness as effectually to accomplish the substance of its purpose." *Id.* at 506.

The Eleventh Amendment, therefore, is clearly broad enough to encompass suits brought (a) against an interstate agency, (b) in an Article I court, (c) by a resident of the District of Columbia. Each of these conclusions, we believe, follows ineluctably from elemental Eleventh Amendment principles.

a. Whether an *interstate* agency may invoke the Eleventh Amendment is a question not different in kind from the question of whether an *intrastate* agency may do so. A State's decision to enter into an interstate compact with one or more other States, and the decision by two or more States to create an interstate agency to exercise intersovereign responsibility for the management of an ongoing interstate enterprise, will normally hinge upon the degree to which mutual cooperation is both necessary and feasible to address a particular problem.[4]

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[1] *E.g.*, *Hans* v. *Louisiana*, *supra* (suit against a State by one of its own citizens).

[2] *E.g.*, *Alabama* v. *Pugh*, 438 U.S. 781 (1978) (per curiam) (suit against a state agency).

[3] *E.g.*, *Ex parte New York*, 256 U.S. 490 (1921) (suit against a State in admiralty).

[4] In this regard, while some degree of economic self-sufficiency is often desirable, it is likewise often the case, as it is with respect to WMATA, that each of the state signatories to an intersate compact will retain some degree of financial responsibility for the

Nothing in the history or purposes of the Eleventh Amendment suggests that the States must abandon their immunity when joining together to create an interstate agency. The important question, however, is not whether the Framers of the Eleventh Amendment had in mind the possibility that a State would resort to an interstate agency, rather than an institution all of its own, to carry out the business of the State. The question is whether, if the Framers had considered this matter, they would have reasonably concluded that a State surrendered all hope of immunity for this agency simply because a State was forced, by the necessities of the problem it faced, to join with another State in an ongoing enterprise. *Cf. Hans* v. *Louisiana*, 134 U.S. at 15. It is unreasonable to conclude that the Framers would have supposed that the immunity of one when added to the immunity of another left the States together without any immunity at all. Indeed, the fact that the States have agreed among themselves to grant an intersovereign agency immunity from suit in federal courts is no more novel, and no less entitled to respect, than any one State's decision to resolve a matter at the State

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agency's conduct. While a State's liability for an interstate agency's actions is a *sufficient* condition to demonstrate that the agency is an arm of the State (*e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945)), that a suit by private parties against an interstate agency will not potentially subject the state treasury to liability is not a *necessary* condition for that interstate agency to rely upon the Eleventh Amendment. Only last Term, this Court rejected the proposition that the Eleventh Amendment is inapplicable when a State or its officials are sued for nonmonetary relief. "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought." *Cory* v. *White*, 102 S. Ct. 2325, 2329 (1982); *accord*, *Missouri* v. *Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

level through a state agency, rather than leave the problem to local government.

b. The question of whether the Eleventh Amendment is applicable to Article I courts, while never before addressed by this Court, can admit of only one answer. Like the proposition rejected in *Hans* v. *Louisiana* in regard to suits against a State by one of its own citizens, the supposition that the States in overruling *Chisholm* would have given themselves only the left-handed protection against suits in Article III courts, while leaving themselves fully open to suit in an Article I court, is "almost an absurdity on its face." 134 U.S. at 15. The principle that the States, through the Eleventh Amendment, not only left no doubt that *Chisholm* had been overruled, but also sought to reinstate the original understanding of the Constitution that the States had surrendered their sovereign immunity only to the extent necessary " 'in the plan of the convention' " (*Monaco*, 292 U.S. at 322-323 (citation omitted)), is applicable to Article I and Article III courts alike. The States surely did not refuse to submit " 'in the plan of the convention' " to tribunals constitutionally protected from State or congressional influence while, at the same time, willingly submitted themselves to suit before tribunals wholly subject to congressional control. That conclusion is contrary to the principles expressed in *Hans* and *Monaco*, inconsistent with this Court's conclusion that territories may invoke sovereign immunity when sued before non-Article III courts in the federal territories (*see Porto Rico* v. *Castillo*, 227 U.S. 270 (1913); *Kawananakoa* v. *Polyblank*, 205 U.S. 349 (1907)), and antithetical to the history and purposes of the Eleventh Amendment. That anamoly, created by the decision below, should not be permitted to stand.

As Petitioners have made clear (Pet. 19), *Nevada* v. *Hall*, 440 U.S. 410 (1979), does not undermine the

validity of this conclusion. The application of sovereign immunity in *Hall* would have required this Court, under the mantle of the Eleventh Amendment, to elect between different State doctrines of sovereign immunity, and to impress one State's doctrine upon another. *Hall* simply held that the Eleventh Amendment did not require this result. In this case, however, there are no conflicting state doctrines of sovereign immunity which must be reconciled. Instead, the question is one relating to State immunity from suit in what is clearly *not* a State court, and so does implicate the Eleventh Amendment. The failure of the court below to recognize this clear difference between *Hall* and this case cannot be justified.

c. The last question—whether the Eleventh Amendment is inapplicable simply because the plaintiff is a resident of the District of Columbia, rather than one of the States—does not require an extended analysis. This Court's decisions in *Hans* and *Monaco* compel the conclusion that a party is not entitled to abrogate a State's immunity simply by taking up residence on the north side of the Potomac River. Nothing in the reasons for the adoption of the Great Compromise suggest that it was designed to qualify the sovereign rights of the States themselves to decide whether to submit to suit in a federal court. Because the Framers of the Eleventh Amendment surely did not envision that a State's sovereign immunity would vanish simply because a party exercised his right freely to travel interstate (*see Shapiro* v. *Thompson*, 394 U.S. 618 (1969)), it is irrelevant whether a plaintiff resides in the District rather than a State.

2. We agree with the conclusion of the court below (Pet. App. 4a) and the United States Court of Appeals for the District of Columbia (*Morris* v. *WMATA*, No. 81-1209 (D.C. Cir. Mar. 8, 1983) slip op. at 6) that WMATA is an interstate agency of each of the signa-

tories to the Compact. Sections 2 and 4 expressly create WMATA as an interstate agency of each signatory (Pet. 16), and the Compact clearly distinguishes between WMATA and the political subdivisions of Maryland and Virginia. *Id.* at 16 & n.11. Furthermore, Maryland and Virginia both contribute state funds to WMATA for its operating budget, from which WMATA pays the tort judgments against it. Therefore, we agree with Petitioners that WMATA is an arm of the signatory States, and is entitled to invoke the same Eleventh Amendment immunity that Maryland and Virginia could.

3. The central flaw in the interpretation of Section 81 of the WMATA Interstate Compact adopted by the court below is the failure to respect the plain language of its text. That language quite explicitly omits the local courts of the District of Columbia from those in which the signatories permitted WMATA to be sued. Maryland and Virginia are signatories to the Compact and relied upon the plain language of its text in our decision to endorse it. As such, both States interpret the Compact to deny the local District of Columbia courts jurisdiction over WMATA.

The reliance by the court below upon the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, was misplaced. Neither Maryland nor Virginia, of course, was at all involved in the drafting or consideration of that act, and no court in either State has ever concluded that it modified the terms of an interstate compact to which we both agreed. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951). In fact, Section 86(5)(a) of the Compact explicitly states that "[a]ll laws * * * of the United States and the District of Columbia inconsistent with the [Compact] are hereby amended for the purpose of this Act to the extent necessary to eliminate such inconsistencies and to carry out

the provisions of this [Compact] * * *." That section, therefore, amended any then existing federal law inconsistent with the jurisdictional limitations set out in Section 81 of the Compact, and neither Maryland nor Virginia has ever consented to a revision of that section. The failure of the court below to respect the plain language of Section 81 requires this Court to reverse.[5]

In construing Section 81 of the Compact, the court below also failed to give effect to the principle that a statute will not be deemed to have abrogated a State's Eleventh Amendment immunity unless it "explicitly and by clear language indicate[s] on its face an intent to sweep away the immunity of the States" or has "a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." *Quern* v. *Jordan*, 440 U.S. 332, 345 (1979); *see Hutto* v. *Finney*, 437 U.S. 678, 698 n.31 (1978); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 448 n.1, 449 n.2, 452 (1976); *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 285-286 (1973). This Court found such a clear statement of congressional intent in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), because the interstate compact in that case explicitly authorized suit against the interstate agency in "*any* * * * court of the United States * * *." 359 U.S. at 281 (emphasis added). *See also* Pet. 25 n.19 (listing compacts in which Congress broadly authorized suit in *any* court). The decision below, therefore, also conflicts with this Court's decisions in *Petty* and *Quern* and should, for that reason as well, be reversed.

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[5] "Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 102 S. Ct. 2374, 2380 (1982).

**B. This Case Presents the Full Range of Eleventh Amendment and Interstate Compact Issues in a Posture in Which They Will Definitely Recur.**

Review is appropriate because this case presents all of the Eleventh Amendment and Interstate Compact issues that can be expected to arise out of WMATA's status. It is clear that two of the Eleventh Amendment issues presented in the petition will recur in the Article III courts of the District of Columbia. The United States Court of Appeals for the District of Columbia Circuit has recently noted that the Eleventh Amendment may bar suit against WMATA in the Article III courts of the District because WMATA is an interstate agency. *Morris* v. *WMATA*, *supra*, No. 81-1209, slip op. at 6-7. Nonetheless,[6] the question of whether the Eleventh Amendment is applicable to Article I courts cannot arise in the Article III courts in the District. Moreover, the proper construction of Section 81 of the Compact can arise only in one of the local District of Columbia courts. Therefore, only a case like this one presents the full range of Eleventh Amendment issues that are likely to arise out of WMATA's status.[7]

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[6] That the District of Columbia Circuit did not in *Morris* definitively answer that question is of no importance in this regard. Should the District of Columbia Circuit disagree with the District of Columbia Court of Appeals, that conflict would warrant review by this Court. S. Ct. Rule 17.1(a); *see, e.g., Jones* v. *Helms*, 452 U.S. 412, 417 (1981) (noting conflict). But even if the District of Columbia Circuit agrees with the District of Columbia Court of Appeals that WMATA, as an interstate agency, is entitled to invoke the Eleventh Amendment, the erroneous interpretation by the court below of *Nevada* v. *Hall*, *supra*, would be left standing.

[7] Because of WMATA's position as an interstate agency responsible for operating an interstate, mass transit system, tort suits against WMATA, like those against any government agency, are likely to recur with regularity. Since its decision below, the District of Columbia Court of Appeals has repeatedly and summarily reversed other judgments from the local Superior Court in memorandum orders that simply cite this case as authority. *E.g., Lewis*

## CONCLUSION

For the foregoing reasons and the reasons given in the petition, *amici* State of Maryland and Commonwealth of Virginia urge this Court to grant the WMATA petition and to reverse the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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v. *WMATA*, No. CA 10636-80 (D.C. Mar. 15, 1983) (mem.). Therefore, the court below has concluded that its decision in this case has foreclosed any further challenge to the jurisdiction of the local District of Columbia courts based upon either of the grounds contained in the petition. Accordingly, unless this Court reverses the instant cases, WMATA will be forced to defend every tort suit filed against it in the District Superior Court.

No. 82-1540

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
*Petitioners,*

v.

ROBERTO QASIM, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the District of Columbia Court of Appeals**

## RESPONDENTS' OPPOSITION TO CONSIDERATION OF THE BRIEF *AMICI CURIAE* OF THE STATE OF MARYLAND AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 35, Roberto Qasim *et al.*, Respondents in Opposition, hereby oppose consideration of the brief *amici curiae* of the State of Maryland and the Commonwealth of Virginia supporting the petition for a writ of certiorari.

Notwithstanding the interests of the *amici* now asserted, neither Maryland nor Virginia appeared in any of the proceedings below. Moreover, the proferred *amici curiae* brief reveals that their participation in the proceedings before this Court would be entirely superfluous. The legal arguments allegedly supporting review presented by the *amici* do not and could not

differ from those already advanced by Petitioner Washington Metropolitan Area Transit Authority ("WMATA").[1] Because the brief of the *amici* is merely repetitious and cumulative of the arguments presented by WMATA, the brief is superfluous to this Court's disposition of the petition.[2] The *amici curiae* brief therefore should not be considered.

Respectfully submitted,

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[1] The only legal authority discussed by the *amici* that has not already been treated by WMATA is the decision of the United States Court of Appeals for the District of Columbia Circuit in *Morris v. WMATA*, No. 81-1209 (D.C. Cir. Mar. 8, 1983). The *amici* brief seriously misrepresents the tenor of that decision. In *Morris*, the District of Columbia Circuit did not actually decide whether WMATA could invoke sovereign immunity, but contrary to representations made by the *amici*, *Amici* Brief at 7, 10, the Court explicitly stated that "*Lake County Estates* and the terms of Public Law 89-447 §§ 12(a), 16, 17, 18 and 80 [the WMATA Compact] *strongly indicate* that the Authority is either *not* cloaked with the immunity enjoyed by Virginia and Maryland, or has waived such immunity. . ." *Morris v. WMATA, supra*, slip op. at 7 (emphasis added). The decision in *Morris* thus accords with the position of the Respondents. *See* Brief for Respondents in Opposition at 6, n.6. Indeed, to the extent the *amici* urge that the text of the Eleventh Amendment does not distinguish between the judicial power granted Article I and Article III courts, *Amici* Brief at 2, WMATA's express consent in Section 81 of the Compact to suit in the United States District Courts clearly obviates any need to review the decision below, which merely permits suit in the Superior Court as well.

[2] While the filing of this brief apparenty indicates that two of the three signatories believe WMATA is capable of claiming immunity, *cf.* Brief for Respondents in Opposition at 6, n.6, this should be of no moment, as the Opinion below assumed this issue *arguendo*. *See Qasim v. WMATA*, 455 A.2d 904, 907-08 (D.C. 1983) (*en banc*) (Ferren, J., concurring).

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## CERTIFICATE OF SERVICE

In accordance with Rules 22.1 and 28.3 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing "Respondents' Opposition to Consideration of the Brief *Amici Curiae* of the State of Maryland and the Commonwealth of Virginia in Support of the Petition for a Writ of Certiorari" were mailed by first-class United States mail, postage prepaid, to the following counsel of record on this 22nd day of April, 1983:

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